FILED
FEB 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

89-1361

No. 89-____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

*Petitioner*,

—v.—

LARRY WOLLERSHEIM,

*Respondent*.

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

ERIC M. LIEBERMAN
Counsel of Record
DAVID B. GOLDSTEIN
RABINOWITZ, BOUDIN, STANDARD,
KRINSKY & LIEBERMAN, P.C.
740 Broadway-Fifth Floor
New York, New York 10003-9518
(212) 254-1111

MICHAEL LEE HERTZBERG
740 Broadway-Fifth Floor
New York, New York 10003
(212) 982-9870

*Attorneys for Petitioner Church of Scientology of California*

Dated: February 23, 1990

## QUESTIONS PRESENTED

1. Whether the free exercise clause of the First Amendment prohibits courts from imposing emotional distress tort liability based upon peaceful religious practices by permitting juries to determine that such practices constitute "coercive persuasion" and are "outrageous conduct"?

2. Whether an appellate court is required to reverse a jury's general verdict against a church for intentional infliction of emotional distress, where the underlying claims presented to the jury included religious practices protected by the free exercise clause as well as purported acts which may be unprotected, and where the jury's verdict therefore may have rested upon grounds improper under the First Amendment?

3. Whether an appellate court must engage in an independent review of the record where a judgment is based upon activity ordinarily protected under the free exercise clause, and where there exist contextual factual issues which would determine whether the activity may be stripped of constitutional protection?

4. Whether the First and Fourteenth Amendments prohibit an award of punitive damages against a church for providing its central peaceful religious practices to a parishioner?

5. Whether California's failure to establish and enforce clearly defined standards for the award of punitive damages violates the due process clause of the Fourteenth Amendment?

## PARTIES TO THE PROCEEDINGS BELOW AND RULE 28.1 LIST

The parties to the proceedings below were:

The Church of Scientology of California
Larry Wollersheim.

Petitioner Church of Scientology of California has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES TO THE PROCEEDINGS BELOW AND RULE 28.1 LIST | ii |
| TABLE OF AUTHORITIES | vi |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE PETITION | 11 |
| I. THIS CASE RAISES THE RECURRING FUNDAMENTAL QUESTION, UPON WHICH THE LOWER COURTS ARE IN CONFLICT AND DISARRAY, WHETHER TORT LIABILITY MAY BE FOUNDED UPON VOLUNTARY PARTICIPATION IN PEACEFUL RELIGIOUS PRACTICES | 13 |
| II. THE DECISION OF THE COURT OF APPEAL IS IN FUNDAMENTAL CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER APPELLATE COURTS HOLDING THAT A JUDGMENT MUST BE REVERSED WHERE IT MAY HAVE RESTED UPON GROUNDS IMPERMISSIBLE UNDER THE FIRST AMENDMENT | 20 |

PAGE

III. THE DECISION OF THE COURT OF APPEAL IS IN FUNDAMENTAL CONFLICT WITH THE DECISIONS OF THIS COURT HOLDING THAT AN APPELLATE COURT MUST ENGAGE IN INDEPENDENT REVIEW OF THE RECORD WHERE A JUDGMENT IS BASED UPON ACTIVITY ORDINARILY PROTECTED BY THE FIRST AMENDMENT ..... 23

IV. THIS CASE PRESENTS THE IMPORTANT QUESTION WHETHER AN AWARD OF PUNITIVE DAMAGES AGAINST A CHURCH FOR PROVIDING ITS CENTRAL RELIGIOUS PRACTICE TO A PARISHIONER VIOLATES THE FIRST AMENDMENT ..... 26

V. THIS CASE PRESENTS THE RECURRING FUNDAMENTAL QUESTION WHETHER THE STANDARDLESS AWARD OF PUNITIVE DAMAGES VIOLATES CONSTITUTIONAL DUE PROCESS ..... 28

CONCLUSION ..... 30

APPENDICES:

A. Denial of Petition For Review ..... 1a

B. Order Modifying Opinion and Denying Rehearing ..... 2a

C. Opinion of Court of Appeal ..... 5a

D. Denial of Motions for New Trial and JNOV . 45a

PAGE

E. Minute Order Granting in Part and Denying in Part Defendant's Motion *in Limine* ..... 47a

Defendant's Motion *in Limine* ..... 50a

F. Tentative Ruling Granting in Part and Denying in Part Defendant's Motion for Summary Adjudication of Issues ..... 53a

Minute Order Granting in Part and Denying in Part Defendant's Motion for Summary Adjudication of Issues ..... 55a

## TABLE OF AUTHORITIES

**Cases:** PAGE

*Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) .. 29

*Baumgartner v. First Church of Christ, Scientist*, 141 Ill.App.3d 898, 490 N.E.2d 1319, *cert. denied*, 479 U.S. 915 (1986) ..... 15, 18

*Bear v. Reformed Mennonite Church*, 462 Pa. 330, 341 A.2d 105 (1975) ..... 15

*Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) ..... 23, 24, 25

*Bradesku v. Antion*, 21 Ohio App.2d 67, 255 N.E.2d 265 (1969) ..... 15

*Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 109 S.Ct. 2909 (1989) ..... 29

*Cantwell v. Connecticut*, 310 U.S. 296 (1940) ..... 24

*Carrieri v. Bush*, 69 Wash.2d 536, 419 P.2d 132 (Wash. 1966) ..... 16, 20

*Christofferson v. Church of Scientology*, No. A770405184 (Multnomah Cty. 1985) ..... 13

*Christofferson v. Church of Scientology*, 57 Or. App. 203, 644 P.2d 577, *pet. denied*, 293 Or. 456, 650 P.2d 928 (1982), *cert. denied*, 459 U.S. 1206 (1983) ..... 15, 18, 21

*Cohen v. California*, 403 U.S. 15 (1971) ..... 17

*Edwards v. South Carolina*, 372 U.S. 229 (1963) ..... 24

*Estate of Supple*, 247 Cal.App.2d 410, 55 Cal.Rptr. 542 (1966), *cert. denied*, 389 U.S. 820 (1967) ..... 18

PAGE

*Everson v. Board of Education*, 330 U.S. 1 (1947) ... 14

*Fiske v. Kansas*, 274 U.S. 380 (1927) ..... 24

*Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969) ..... 21

*George v. ISKCON of California*, 213 Cal.App.3d 729, 262 Cal.Rptr. 217 (1989), *opinion decertified* (Cal.S.Ct. Nov. 30, 1989), reported in Cal. Law Weekly at 79, 265 Cal.Rptr.No.3 (Feb.2, 1990) .....13, 18, 19, 21

*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)....26, 27

*Gregory v. City of Chicago*, 394 U.S. 111 (1969) .... 21

*Guardianship of Polin*, 675 P.2d 1013 (Okla. 1983), *cert. denied*, 469 U.S. 850 (1984) ..... 18

*Guinn v. Church of Christ of Collinsville*, 775 P.2d 766 (Okla. 1989) .....14, 16

*Harte-Hanks Communications, Inc. v. Connaughton*, 109 S.Ct. 2678 (1989)..... 25

*Hernandez v. C.I.R.*, 109 S.Ct. 2136 (1989) ..... 3

*Hess v. Indiana*, 414 U.S. 105 (1973) ..... 24

*Hester v. Barnett*, 723 S.W.2d 544 (Mo.App. 1987) .. 15

*Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).....14, 16, 20, 27

*In re The Bible Speaks (Dovydenas)*, 869 F.2d 628 (1st Cir.), *cert. denied*, 110 S.Ct. 67 (1989)..... 15

*International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979)..... 27

PAGE

*Jenkins v. Georgia*, 418 U.S. 153 (1974)..... 24

*Katz v. Superior Court*, 73 Cal.App.3d 952, 141 Cal.Rptr. 234 (1977)..... 18

*Lewis v. Holy Spirit Ass'n*, 589 F.Supp. 10 (D.Mass. 1983)..... 18

*Madsen v. Erwin*, 395 Mass. 715, 481 N.E.2d 1160 (1985)..... 16

*Meroni v. Holy Spirit Assoeiation*, 119 A.D.2d 200, 506 N.Y.S.2d 174 (1986)..... 18

*Molko v. Holy Spirit Association*, 179 Cal.App.3d 450, 224 Cal.Rptr. 817 (1986), *reversed*, 46 Cal.3d 1092, 252 Cal.Rptr. 122, 762 P.2d 46 (1988), *cert. denied*, 109 S.Ct. 2110 (1989)..... 18

*Molko v. Holy Spirit Association*, 46 Cal.3d 1092, 252 Cal.Rptr. 122, 762 P.2d 46 (1988), *cert. denied*, 109 S.Ct. 2110 (1989).....15, 18, 19

*Mull v. Church Universal & Triumphant, Inc.*, No. C358191 (L.A. Sup.Ct. 1986), *aff'd*, No. B021187 (Cal.Ct.App. 1989), *cert. denied*, 58 U.S.L.W. 3449 (Jan. 16, 1990)..... 14

*Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105 (1943)..... 14

*NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982).....17, 21, 22, 23, 25

*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).....21, 24

*Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). 27

*Niemotko v. Maryland*, 340 U.S. 268 (1951)..... 25

*O'Neil v. Schuckardt*, 112 Idaho 472, 733 P.2d 693 (1986).....14, 16, 19

PAGE

*Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) ..... 17

*Orlando v. Alamo*, 646 F.2d 1288 (8th Cir. 1981) .... 15

*Paul v. Watchtower Bible and Tract Society*, 819 F.2d 875 (9th Cir.), *cert. denied*, 484 U.S. 926 (1987) ..15, 20

*Peterson v. Sorlien*, 299 N.W.2d 123 (Minn. 1980) ... 20

*Radecki v. Schuckardt*, 50 Ohio App.2d 92, 361 N.E.2d 543 (1976) ..... 15

*Rasmussen v. Bennett*, 228 Mont. 106, 741 P.2d 755 (1987) ..... 15

*Street v. New York*, 394 U.S. 576 (1969) .....21, 24

*Stromberg v. California*, 283 U.S. 359 (1931) ..... 21

*Thomas v. Collins*, 323 U.S. 516 (1945) ..... 21

*Turner v. Unification Church*, 473 F.Supp. 367 (D.R.I. 1978) ..... 18

*United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) .....21, 22, 23

*United States v. Ballard*, 322 U.S. 78 (1944) ..... 18

*United States v. Kozminski*, 487 U.S. 931, 108 S.Ct. 2751 (1988) ..... 17

*Van Schaik v. Church of Scientology*, 535 F.Supp. 1125 (D.Mass. 1982) ..... 15

*Wisconsin v. Yoder*, 406 U.S. 205 (1972) ..... 26

*Witt v. Church Universal & Triumphant, Inc.*, No. B021187 (Cal.App. 1989), *cert. denied*, 58 U.S.L.W. 3449 (Jan. 16, 1990) .....16, 19

PAGE

**Constitutional and Statutory Provisions:**

U.S. Const. Amend. I ..... *passim*

U.S. Const. Amend. VIII ..... 29

U.S. Const. Amend. XIII ..... 17

U.S. Const. Amend. XIV ..... 2, 28

18 U.S.C. § 1584 ..... 17

28 U.S.C. § 1257(a) ..... 2

42 U.S.C. § 1983 ..... 27

Cal.Civ. Code § 3294(b) ..... 28

BAJI 14.73 ..... 28

BAJI 14.71 ..... 28

**Miscellaneous:**

L. Tribe, American Constitutional Law (2d ed. 1988). 14

Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation*, and *Hustler Magazine v. Falwell*, 103 Harv.L.Rev. 603 (1990) ..... 17

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

The Church of Scientology of California petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, Second Appellate District.

## OPINIONS BELOW

The order of the Supreme Court of the State of California denying a petition for review is unreported (1a).[1] The opinion and judgment of the California Court of Appeal, Second Appellate District (5a-44a), is reported at 212 Cal.App.3d 872, 260 Cal.Rptr. 331 (1989). The order of the Court of Appeal modifying that opinion and denying rehearing (2a-4a) has been certified for publication. The order of the Superior Court of Los Angeles County, State of California, denying, without opinion, motions for a new trial and a judgment notwithstanding the verdict (45a-46a) is not reported. The orders of the Superior Court summarily adjudicating that Scientology is a religion and otherwise denying the Church's motion for summary judgment (53a-56a), and granting in part the Church's motions *in limine* (47a-52a), are unreported.

## JURISDICTION

The judgment of the California Court of Appeal modifying in part, affirming in part, and reversing in part the judgment of the Superior Court was filed on July 18, 1989 (5a). The court of appeal denied petitioner's timely petition for rehearing on August 17, 1989 (2a). On October 26, 1989, the Supreme Court of California denied petitioner's timely petition for review (1a). On January 17, 1990, Justice O'Connor

---

1 References to "_____a" are to the Appendices to this petition. Citations to "RT_____" are to the Reporters Transcript, numbered A1 to A1009 for pretrial proceedings, and 1 to 15,311 for trial and post-trial proceedings. References to "App. A_____" are to pages in the Appellant's Appendix in Lieu of Clerk's Transcript, filed in the Court of Appeal.

extended the time for filing a petition for a writ of certiorari to and including February 23, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . .

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part, that:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

In this action, respondent Wollersheim, a former member of the Church of Scientology of California ("the Church"), sued the Church primarily on the theory that his voluntary participation in the Church's central and peaceful religious practice of auditing caused him severe emotional distress, and that the practice constituted "outrageous conduct". The jury returned a verdict of $30,000,000, which was reduced by the California Court of Appeal to $2,500,000. The court of appeal otherwise affirmed the judgment on the ground that there was evidence in the record to show that Wollersheim's participation in Scientology religious practices was coerced by physical force or threats of secular retribution. This theory not only was never presented or argued at trial, but directly contradicted Wollersheim's own testimony and theory of the case, which was that he had become "addicted" to auditing. The decision of the court of appeal, which refused to engage in the scope of review mandated in First Amendment cases, and which ignored the indisputable fact that massive damages

were imposed upon a religious organization for its constitutionally protected peaceful religious practices, poses a substantial threat to the free exercise of religion of minority religious organizations and their members.

1. Wollersheim was a member of the religion of Scientology from 1969 until 1979, during which time he intermittently participated in Scientology religious practices, including its central practice of auditing (6a-7a).[2] He initiated this action on July 28, 1980.

Wollersheim's second amended complaint alleged four causes of action (App. A1-20): (1) fraud, in inducing Wollersheim to engage in auditing; (2) fraud, in failing to disclose the purportedly "experimental" and "dangerous" nature of auditing; (3) intentional infliction of emotional distress by outrageous conduct in: (a) providing auditing to Wollersheim; (b) purportedly urging Wollersheim to sever ties or "disconnect" from certain family members; (c) a purported unauthorized disclosure of confidential material from Wollersheim's auditing records; and (d) an alleged effort to destroy Wollersheim's business in mid-1979 by means of a church-ordered boycott, pursuant to a purported Church policy called "fair game"; and (4) negligent infliction of emotional distress in the provision of auditing to Wollersheim.

Wollersheim's two fraud counts were nonsuited at the conclusion of his case (RT 8106, 8118) and the court of appeal reversed the jury verdict finding negligent infliction of emotional distress (34a-36a). Wollersheim took no appeal from these rulings. Petitioner describes below the proceedings and facts with respect to Wollersheim's intentional infliction of emotional distress claim, with particular emphasis on the

---

2 Auditing consists of a parishioner and auditor sitting in a room while the auditor asks a series of questions to which the parishioner responds (RT 1991-92, 8335-36). The purpose of auditing is to unburden a person of spiritually painful experiences, both in present and past lifetimes, and to orient a person as a spiritual being (App. A49-50, A59; RT 8335-36, 8364); (22a-23a). The core religious beliefs of Scientology and the nature of auditing are described in *Hernandez* v. *C.I.R.*, 109 S.Ct. 2136, 2141 & n.2 (1989). Wollersheim presented *no* evidence showing that auditing was anything other than the peaceful, deliberative process described above.

auditing element of the claim, which was by far the primary focus of Wollersheim's case.

2. On June 14, 1985, after a hearing, the trial court summarily adjudicated that Scientology is a religion, stating that: "The supporting documents for the proposition that Scientology is a religion do more than make a *prima facie* case; they make a strong case." (53a-54a; *see* 55a-56a).[3]

The trial court subsequently ruled that auditing was the central religious practice of Scientology and that the following would not be subjects of inquiry at trial: (1) the Church's belief in and practice of auditing; (2) representations with respect to the benefits, nature or efficacy of auditing; and (3) evidence of the alleged successes or failures of auditing (RT A480; 48a, 51a).

At trial, however, a different judge ruled that Wollersheim could present evidence of the effect of auditing upon him and the truth or falsity of representations about the benefits he might receive from auditing (RT 100, 105-06, 114). The court justified its ruling on its contention that "[b]eliefs are protected, but acts are not" (RT 84).

Wollersheim placed his greatest emphasis at trial on his claims that his participation in auditing caused him severe emotional distress. His theory was that (1) he became dependent upon, indeed, "addicted" to auditing, believing it was necessary to his physical and spiritual survival (this process was denominated "thought reform" or "brainwashing" by Wollersheim's expert witness, psychologist Margaret Singer (9a)); and (2) the provision of auditing to Wollersheim, *per se*, caused him severe emotional harm and constituted outrageous conduct (Complaint, App. A6-8; A10-13; RT 606, 632-33).

Thus, in his opening statement, Wollersheim's counsel emphasized that Wollersheim came to believe in the value of auditing and *wanted* to undertake it (RT 637-38, 650, 652). Similarly, Wollersheim's counsel, in explaining his theory of

---

3 The court rejected the Church's contentions in its summary judgment motion that each of Wollersheim's claims were barred by the First Amendment. (App. A38-41; 56a).

recovery to the court, stated that Wollersheim had, in effect, been seduced into undergoing auditing and that he wished to show "the [purportedly negative] effect that the [upper level auditing] materials had on Mr. Wollersheim" (RT 2140-41). The testimony of Wollersheim and his expert witnesses was consistent with this theory, and clearly demonstrated that he participated in auditing because he wanted to, or because, in his own words, he was "addicted" to it and that "he wanted to do everything," *i.e.*, all levels of auditing. (RT 6159-61, 4837; *see* RT 5322 (he felt an "urgency" to undergo auditing), 2508 (he told Singer that auditing "was my last hope and I had to believe or be trapped forever")[4], 4790-93, 4805-08, 4836-38, 4844-47, 4877-79, 4888-93, 5025-26, 5190-91, 5197-99, 5302, 6178).

Wollersheim's lengthy testimony that his participation in auditing caused him great emotional distress was supported by Singer, his star expert witness. Singer, over continuing objections, characterized the lower levels of auditing as part of a system of thought reform (*e.g.*, RT 2414-15, 2343-45, 2606, 5012-13), and characterized the upper levels of auditing as "freaking experiments," and responsible for the destruction of all values (RT 2193-95, 2240-42, 2475-78, 5048-50, 13,897). Singer described five "cataclysmic" events experienced by Wollersheim, which purportedly activated a preexisting manic-depressive condition (RT 2155-56); four of these events were auditing experiences. As a result of these experiences, Singer stated that Wollersheim suffered the emotional distress which was the subject of the case (RT 2156-57, 2241-42, 2562-64).

In closing argument, Wollersheim's counsel placed his greatest emphasis on the auditing allegations, and never argued that Wollersheim was, or felt threatened, to participate in auditing. He asserted that auditing "precipitated Wollersheim's genetic precondition to a full-blown symptomatic mental disease called bipolar disorder" (RT 14,403, 14,713; *see also* RT 14,467, 14,490-93, 14,762).

---

4 Scientologists believe that a person is trapped forever in a spiritual vacuum unless he or she is released through the spiritual practice of auditing. App. A49; *see* n.2, *supra*.

At no time in this six-month trial did Wollersheim, Singer or any other witness testify, nor did his counsel argue, that Wollersheim ever participated in auditing because of physical coercion or secular threats of retribution by the Church, actual or implied.[5]

The trial court instructed the jury that Scientology is a religion, that auditing is its central religious practice, and that the verdict could not be based on the *validity* of religious beliefs and practices (RT 14,778). It refused, however, to give instructions, requested by the Church, that the jury could not award damages based upon "the plaintiff's participation in auditing or . . . any of the other religious practices of the Church" (App. A312), or "evaluate the potential . . . harmfulness of religious . . . practices" (App. A309-1) or consider "the effectiveness or desirability of auditing" (App. A305). Thus, the jury was permitted to base its verdict on harms purportedly caused by Wollersheim's voluntary participation in auditing.

3. As noted above, Wollersheim also alleged other acts in support of his single, unified intentional infliction of emotional distress claim. With respect to his allegation that he was induced to "disconnect" from his first wife and his father, the evidence showed: (1) that after his first wife tried to stab him in the course of a domestic argument, various Scientologists suggested that he should "get away" from her or that he "would be best away from her" (RT 4973-75); that he nevertheless stayed with her because he "grew to love her" (RT 4977); but that he ultimately divorced her; (2) that he had a poor relationship with his father prior to being involved in Scientology, and that the Church required him to attempt to "work things out" with his family and visit his father (RT 3578, 6638; Ex. 289). Wollersheim claimed that

---

5 Wollersheim last received auditing in June, 1979 in Florida (RT 5227). He testified that he stopped further auditing because he felt emotionally stressed, panicky, and suicidal. He testified that when he left Florida, "I sincerely believed they would leave me alone, and just let me alone . . . I believed that they were basically, you know, my friends and good people and they wouldn't forget that" (RT 5382, 5389), *i.e.*, at that time he had no fear of retribution from the Church if he stopped auditing.

the Church merely intended that he work out a superficially friendly relationship with his father, without meaningful content. The trial court refused to instruct the jury that a Church's application of a "disconnect" or "shunning" policy to its membership is protected by the First Amendment.

With respect to Wollersheim's claim that the Church attempted to destroy his business pursuant to an alleged policy of "fair game", Wollersheim testified that Scientologists ceased working for him or doing business with him in May, June and July of 1979, and that they refused to pay debts to his factor (RT 7837, 5270-01, 5281, 5351-52). The Church denied the claim, but also sought an instruction that a Church-ordered boycott of plaintiff's business was not actionable (App. A314), which was denied (RT 14,394).[6]

4. The jury returned a verdict for $5,000,000 in compensatory and $25,000,000 in punitive damages. The trial court denied without comment the Church's motions for new trial and judgment notwithstanding the verdict (45a), which, *inter alia*, challenged the verdict and the punitive damage award on First Amendment grounds.

5. On appeal, the Church raised each of the issues presented herein.[7] The court of appeal affirmed the judgment as to liability on the claim of intentional infliction of emotional distress, reversed the judgment on the claim of negligent infliction of emotional distress, and reduced the damage awards to $500,000 in compensatory damages and $2,000,000 in punitive damages (43a-44a).

---

6 As to the claim of disclosure of confidential information, the only evidence was Wollersheim's testimony that several members of the Church of Scientology Celebrity Center of Los Angeles told him in June 1976 (over four years prior to the filing of the lawsuit) that they had reviewed his auditing folders (RT 5153-55). Wollersheim's counsel never even addressed this claim in his closing argument to the jury.

7 The issue that the appellate courts must engage in an independent review of the entire record in this First Amendment case did not arise until after the court of appeal's decision, as discussed, n.20, *infra*, and was raised in the Petition for Rehearing and the Petition for Review.

The court held that auditing is a religious practice that ordinarily constitutes protected activity under the First Amendment, and cannot be made actionable by the state even if it results in severe emotional distress (23a-24a). The court held that the auditing at issue in this case, however, was not constitutionally protected because it found that evidence existed in the record from which the jury could have concluded that Wollersheim did not participate in auditing voluntarily, but rather was coerced into it by physical force and secular threats (24a-25a), a theory never advanced by Wollersheim or presented to the jury as the predicate by which it could render a verdict on behalf of Wollersheim.

The court of appeal identified three bases for its finding that Wollersheim was coerced into participating in auditing: (1) Wollersheim feared that he would be subject to a purported church policy of retribution called "fair game" if he did not participate in auditing; (2) Wollersheim feared that he would have to pay a "freeloader debt" if he did not participate in auditing; and (3) Wollersheim was subjected to physical restraint on one occasion when he attempted to leave the RPF[8] in 1974 (25a-27a). Not only did the court of appeal fail to identify any evidence which supported its new theory that Wollersheim participated in auditing because of such coercion,[9] but it ignored the testimony of Wollersheim and his

---

8 In the fall of 1974, Wollersheim committed acts that were deemed to violate Church ethics policy (RT 9313-16). Wollersheim was given the choice of leaving staff entirely, or participating in the "Rehabilitation Project Force" (RPF), the purpose of which was spiritual rehabilitation (RT 9319). The program included study, counseling, and manual labor (RT 4683-84). Wollersheim accepted the offer of physical work and spiritual rehabilitation (Exs. 267, 273). At trial he testified to hard manual labor, dirty conditions, lack of food, and being "a broken man" as a result of his six weeks on the program (27a; RT 5021-22).

9 With respect to "fair game", the Church disputed that any such policy of retribution existed. In any event, though, Wollersheim simply did not testify that he was coerced to audit because he was afraid of "fair game", and there was no evidence that he ever was threatened with "fair game" or retribution if he were to cease auditing. Indeed, he testified that when he

experts that Wollersheim volunteered and even pleaded for auditing, not that he was threatened into taking auditing.

The court applied the same "coercion" theory and the same method of review to the "disconnect" claim. The court acknowledged that there is a substantial question as to whether a policy of "disconnection" or "shunning" is constitutionally protected (32a). It held, however, that Wollersheim was "coerced" into shunning his family, and that therefore the practice was not protected by the First Amendment (32a-33a).

The court of appeal did not even address the Church's arguments that the imposition of punitive damages against the Church for providing its central religious practice violates the First Amendment, that the standardless determination of

---

stopped auditing and left the Church in 1979, "I sincerely believed they would leave me alone . . . I believed that they were basically, you know, my friends and good people and they wouldn't forget that" (RT 5382).

According to the undisputed testimony, a "freeloader debt" is a bill submitted to a church staff member who, pursuant to his employment contract, receives free religious courses or auditing, but then fails to perform the employment agreed upon; it is *not* imposed because of a failure to take auditing (RT 4889-89, 7534-36, 13,255). Indeed, as Wollersheim testified, if a freeloader bill is outstanding, the person *cannot* take auditing. Only *after* Wollersheim paid his freeloader debt in 1976, was he permitted to resume auditing, which is what he wanted to do so much that he paid money for it thereafter (RT 5159-60, 6233-34). Indeed, *all* of Wollersheim's auditing during his first three and last three years in Scientology was undertaken when he was not a staff member, and not subject to a potential freeloader debt. The court of appeal completely misinterpreted "Freeloader debt," and there is absolutely no evidentiary support for its conclusion that Wollersheim undertook auditing for fear of incurring a "freeloader debt" (26a).

Finally, with respect to the "physical restraint" incident, Wollersheim testified that at one point when he was on the RPF in 1974, he attempted to leave. He was confronted by three Scientologists, who applied to him what he called "8C," which he described as follows: "They will use just enough force to restrain you according to the amount of force you exert" (RT 5018). According to Wollersheim, one of the three said to him, "Look, you can still go after we talk. Let's just take a little time and talk" (RT 5019). Wollersheim agreed to talk, and after "half an hour to an hour" agreed to go back to the RPF. *Id.* There is no testimony that he stayed against his will, or that he felt coerced to audit at any time as a result of that single brief incident.

punitive damages violates constitutional due process, and even that the trial court improperly refused to instruct the jury on the statutory standard for imposing punitive damages on a corporate defendant.

The court of appeal found the jury's imposition of $5,000,000 in compensatory damages was so grossly excessive as to suggest "prejudice or passion" (41a), and that the award of $25,000,000 in punitive damages was "preposterous" (43a). Rather than concluding that a new trial was required, the court, without further explanation, reduced the damage awards by over ninety per cent, to $500,000 compensatory damages and $2,000,000 punitive damages (41a-43a).

Petitions for rehearing by both sides were denied on August 17, 1989 (2a). The only substantive modification in the opinion made by the court was to eliminate the word "preposterous" from its opinion (3a).

Petitions for review by both parties to the Supreme Court of California, in which the Church raised all the issues presented herein, were denied on October 26, 1989 (1a).

Petitioner emphasizes that Wollersheim also recognized that the court of appeal's "coercion" theory was wholly unrelated to his case. Thus, in his petition for review, Wollersheim asserted error by the court of appeal:

> the "auditing" as designed and implemented by Scientology was an integral, essential component of Scientology's "thought reform" program and was used primarily to subjugate the will and control the mind.
>
> * * *
>
> Under Wollersheim's evidence and theory of the case, there was no such phenomenon as "voluntary auditing".
>
> * * *
>
> *Indeed, under Wollersheim's theory of the case and evidence, "auditing" was, by its very nature and function, coercive.* Therefore, the Decision in that respect runs directly contrary to the evidence when construed to support the judgment.

Petition for Review of Wollersheim, at 8-10 (emphasis added).

## REASONS FOR GRANTING THE PETITION

In recent years, the lower state and federal courts have been inundated with a flood of litigation brought by former members of minority religions based upon peaceful and voluntary religious practices. The state of the law in this highly sensitive First Amendment area is, to put it bluntly, in chaos. While some courts have refused to permit tort liability based on peaceful religious practices, or "thought reform" theories, a disturbing number of courts, including the trial court below, have permitted plaintiffs, in effect, to put their former religions on trial for causing severe emotional distress through "outrageous," yet peaceful and voluntary religious practices. And many appellate courts, including the court below, have provided lip service to substantive First Amendment doctrine protecting the free exercise of religion, but have utterly abdicated their appellate responsibility—exercised in other First Amendment contexts such as libel, obscenity, and seditious speech—of ensuring that substantive constitutional protections are made meaningful through searching appellate review.

This case presents, in dramatic form, all the elements of the chaotic failure of the lower courts in this country—and particularly in California—to protect the religious liberties of newer and unorthodox religious societies.

At the trial level, the Church was subjected to what can only be characterized as a six-month heresy trial, in which its central religious practice of auditing was made the centerpiece of a claim for intentional infliction of emotional distress, and for which an inflamed jury imposed $30,000,000 in damages.

In affirming the judgment, the California Court of Appeal failed to follow any of the rules of appellate review mandated in a case involving activity presumptively within the zone of First Amendment protection. While acknowledging that the Church's peaceful religious practice of auditing ordinarily would be constitutionally protected, the court held that the Church's First Amendment protection for providing auditing could be "stripped away" (18a) because there purportedly was some evidence which would have justified the jury in

concluding that this plaintiff's participation in the religious practice was coerced by physical force or secular threats. The court's affirmance on this ground came despite the fact that the court's coercion theory was directly contrary to the theory of recovery urged by the plaintiff, despite the fact that it was belied by plaintiff's own testimony, and despite the fact that the plaintiff never requested and the court never gave instructions which would have directed—let alone limited—the jury to such a theory for "stripp[ing] away" First Amendment protection from religious practices.

In other First Amendment contexts, this Court has emphasized two fundamental rules of appellate review: (1) a general verdict must be reversed where it *may* have rested upon unconstitutional grounds, even assuming there was evidence to support the verdict on a constitutionally permissible ground; (2) where there is a question whether First Amendment protection may be withdrawn from otherwise protected speech because of the particular factual context surrounding the speech, an appellate court must engage in an independent review of the evidence of the purported factual context justifying the withdrawal of constitutional protection.

These two rules are interrelated, and serve a common purpose. They help insure that out of the complex maelstrom of a jury trial, no one is subjected to liability because he chose to exercise his fundamental rights under the First Amendment. Application of such rules of appellate review compels litigants and trial courts to limit the claims presented to juries to those permitted by the First Amendment, and to make clear to juries through precise instructions that they cannot impose judgments based upon protected activities.

The court below, like many appellate courts, utterly failed to apply these rules to a case involving religious free exercise. That failure can only encourage the growing trend of apostate church members filing overbroad tort claims based upon religious practices, knowing that juries are likely to become inflamed upon hearing evidence of "strange" and purportedly emotionally stressful practices and that trial and appellate courts are likely to continue to uphold resulting inflated jury verdicts, at least if they can find some evidence in the

record of secular fraud or coercion. Certiorari should be granted to make clear the proper constitutional limits on the trial of claims brought on the basis of religious practices, and how appellate courts must review such cases.

*I. This case raises the recurring fundamental question, upon which the lower courts are in conflict and disarray, whether tort liability may be founded upon voluntary participation in peaceful religious practices.*

It is indisputable—in fact Wollersheim agreed in his petition for review to the California Supreme Court—that this case was tried upon the theory that the Church's provision to Wollersheim of the peaceful religious practice of auditing was itself actionable as "outrageous conduct". Wollersheim claimed that his initial exposure to auditing caused him to become "psychologically dependent" upon and "addicted" to the practice, and that he thus continued to participate in it despite the fact that it purportedly caused him severe emotional distress. The jury was invited to and did assess millions of dollars in damages based upon a conclusion that plaintiff's participation in auditing was "outrageous".

The trial of this case thus directly raises the question whether the state may draw the line between protected and unprotected peaceful religious practices through the subjective application by juries of the concept of "outrageous conduct". To allow juries to impose damages arising from voluntary participation in peaceful religious practices, based on a subjective "outrageousness" standard, would directly impede the free exercise of religion. No church could "free[ly] exercise" its religion under the threat of such inquiry and judgment, particularly in light of the huge awards juries are wont to impose that may cripple or destroy minority religions.[10] Adjudication of such disputes "would

---

10 In addition to the $30 million jury verdict here, recent jury verdicts have included the following: (1) $39 million in *Christofferson* v. *Church of Scientology*, No. A770405184 (Multnomah Cty. 1985), overturned by the trial court on a motion for mistrial; (2) $32 million in *George* v. *ISKCON of*

. . . declare open season on churches and their followers." L. Tribe, *American Constitutional Law* 1235 (2d ed. 1988).

In *Hustler Magazine* v. *Falwell*, 485 U.S. 46 (1988), this Court held that a highly offensive parody of a public figure could not be actionable under a claim of intentional infliction of emotional distress. The Court concluded that there was no "principled standard" to separate the parody from more traditional political cartoons in terms of constitutional protection, *id.* at 55, and stated that, "we are quite sure that the pejorative description 'outrageous' does not supply one," *id.*

The Court's fear that the "inherent subjectiveness" of the term "outrageousness" "would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression," *id.*, is even more apt where religious belief and practice are at issue. Religious beliefs tend to be among the most strongly held and exclusive points of view, and they uniquely engender controversy, hostility, rivalry and prejudice. It is objectively unreasonable to expect that jurors will be able to put aside their own sacred beliefs and biases when confronted with opposing or novel religious claims, especially given the well-known history of public opprobrium for unconventional religious societies. *See e.g.*, *Everson* v. *Board of Education*, 330 U.S. 1, 8-14 (1947); *Murdock* v. *Commonwealth of Pennsylvania*, 319 U.S. 105, 116 (1943). Certainly, the "pejorative description 'outrageous' does not supply" the principled standard to distinguish constitutional from unconstitutional peaceful religious practices, any more than in the realm of free speech. Just as *Falwell* rejected tort liability for *emotional* injury

---

*California*, 213 Cal.App.3d 729, 262 Cal.Rptr. 217 (1989), *opinion decertified* (Cal.S.Ct. Nov. 30, 1989), *reported in* Cal. Law Weekly at 79, 265 Cal.Rptr.No.3 (Feb.2, 1990), reduced to over $11 million by the trial court, and further reduced to $3 million on appeal; (3) $1,563,000 in *Mull* v. *Church Universal & Triumphant, Inc.*, No. C358191 (L.A. Sup.Ct. 1986), *aff'd*, No. B021187 (Cal.Ct.App. 1989), *cert. denied*, 58 U.S.L.W. 3449 (Jan. 16, 1990); (4) $1,000,000 in *O'Neil* v. *Schuckardt*, 112 Idaho 472, 733 P.2d 693 (1986), reduced on appeal to $250,000; (5) $390,000 against a local congregational church in *Guinn* v. *Church of Christ of Collinsville*, 775 P.2d 766 (Okla. 1989), reversed and remanded on appeal.

from political speech, the First Amendment forbids recovery for emotional injury caused by voluntary participation in peaceful religious practices.

The question whether ex-members may recover for intangible or emotional distress torts arising out of peaceful and voluntary religious practices continues to arise with increasing frequency in the lower courts, with inconsistent results. Those courts which have rejected such claims have recognized that the free exercise clause must and does protect peaceful religious practices, particularly with respect to the relationship between a church and a member or ex-member.[11] Other courts, however, like the court below, have held that such claims may be actionable, at least in certain circumstances.[12]

---

11 *See, e.g., Paul* v. *Watchtower Bible and Tract Society*, 819 F.2d 875, 880, 883 (9th Cir.) (holding that the Jehovah's Witnesses could not be held liable for intentional infliction of emotional distress and other "intangible emotional torts" for the religious practice of "shunning"), *cert. denied*, 484 U.S. 926 (1987); *Orlando* v. *Alamo*, 646 F.2d 1288, 1290 (8th Cir. 1981) (Church's indoctrination program not actionable); *Van Schaik* v. *Church of Scientology*, 535 F.Supp. 1125, 1139 (D.Mass. 1982) (exhortation by Church "to sever family and marital ties and to depend solely on the Church for emotional support" does not support a claim for intentional infliction of emotional distress); *Baumgartner* v. *First Church of Christ, Scientist*, 141 Ill.App.3d 898, 490 N.E.2d 1319, 1326, *cert. denied*, 479 U.S. 915 (1986); *Rasmussen* v. *Bennett*, 228 Mont. 106, 741 P.2d 755 (1987); *Christofferson* v. *Church of Scientology*, 57 Or. App. 203, 644 P.2d 577, 590, *pet. denied*, 293 Or. 456, 650 P.2d 928 (1982), *cert. denied*, 459 U.S. 1206 (1983); *Radecki* v. *Schuckardt*, 50 Ohio App.2d 92, 361 N.E.2d 543, 544 (1976); *Bradesku* v. *Antion*, 21 Ohio App.2d 67, 255 N.E.2d 265, 269 (1969).

12 *See, e.g., Molko* v. *Holy Spirit Association*, 46 Cal.3d 1092, 1120, 1123-24, 252 Cal.Rptr. 122, 762 P.2d 46 (1988) (threats of "divine retribution" cannot state a claim for intentional infliction of emotional distress or false imprisonment, although misrepresentation and concealment of the church's identity for the purpose of inducing plaintiffs unknowingly to submit to the Church's practices may state an emotional distress claim), *cert. denied*, 109 S.Ct. 2110 (1989); *In re The Bible Speaks (Dovydenas)*, 869 F.2d 628, 645 (1st Cir.) (allowing undue influence claim for purportedly solely secular misrepresentation by religious organization to obtain funds from member), *cert. denied*, 110 S.Ct. 67 (1989); *Bear* v. *Reformed Mennonite Church*, 462 Pa. 330, 341 A.2d 105, 107-08 (1975) (suggesting that shunning "may be excessive interference within areas of paramount state concern"); *Hester* v.

And some courts have found the claims to be actionable, on the basis of harms caused, at least in part, by religious practices or religiously-motivated speech or conduct.[13] These issues are pending in numerous cases throughout the country.

Nor can Dr. Singer's theory of "thought reform" or "coercive persuasion" remove the constitutional protection accorded peaceful religious practices.[14] There is simply no principled way by which a court may draw the distinction, within the confines of the First Amendment, between the religious convert who is "legitimately" persuaded by the beliefs and practices of one religion from the convert who is "illegitimately" or "outrageously" persuaded by the beliefs and practices of another. *See Hustler Magazine* v. *Falwell*, 485 U.S. at 55-56. The notion that individuals may be so easily "coerced" by peaceful religious practices into becoming "deployable agents" of a religion is contrary to the very con-

---

*Barnett*, 723 S.W.2d 544, 555, 560 (Mo.App. 1987) (no alienation of affection claim for "preachment of doctrine or advocacy of religious faith"; but "use of the pulpit as the pretext for the practice of religion, but as the occasion for intentional defamation" is actionable); *Madsen* v. *Erwin*, 395 Mass. 715, 481 N.E.2d 1160, 1167 (1985) (dismissing emotional distress claims, but allowing repleading); *Guinn* v. *Church of Christ of Collinsville*, 775 P.2d 766 (Okla. 1989) (First Amendment prohibits tort liability for ecclesiastical discipline imposed upon member, but not for discipline imposed after member withdraws from Church).

13 *See, e.g., Witt* v. *Church Universal & Triumphant, Inc.*, No. B021187 (Cal.App. 1989) (prayers and threats of divine retribution designed to elicit donations of money held to be actionable as outrageous conduct), *cert. denied*, 58 U.S.L.W. 3449 (Jan. 16, 1990); *O'Neil* v. *Schuckardt*, 112 Idaho 472, 733 P.2d 693, 699-701 (1986) (intensive prayer, fasting, and isolation from community held to be actionable); *Carrieri* v. *Bush*, 69 Wash.2d 536, 419 P.2d 132, 135-37 (Wash. 1966) (threats of damnation, along with ill will and "reckless" recommendations of family separation based upon biblical interpretations renders pastor liable for alienation of affections.

14 The "coercive persuasion" theory presented in this case is wholly independent of any claim of physical violence, restraint, or threats. Indeed, Dr. Singer did not rely at all on the one incident of purported "restraint" in 1974 upon which the court of appeal placed so much emphasis. Rather, according to Singer, the "thought reform" was carried out through auditing itself and other Scientology religious practices.

cept of a democratic society based on decisions made by individuals with free will, which is the fundamental predicate of the First Amendment. If individuals are so easily subject to "thought reform," then the concepts of individual choice and autonomy—upon which both the "free exercise" and "free speech" clauses of the First Amendment are premised—are meaningless platitudes. *See, e.g., Cohen* v. *California*, 403 U.S. 15, 24 (1971) (First Amendment removes governmental restraints from arena of public discussion "in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests"); Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 Harv.L.Rev. 603, 630-31 & nn.161-62, 634 (1990) (discussing the "strong 'intellectual individualism' that characterizes first amendment doctrine," which "is linked to the innermost logic of democracy . . . . democracy must at root presuppose citizens autonomous enough to create, rather than be created by, their communities").

Indeed, even the terminology of this new tort theory—"coercive pursuasion"—is in fundamental conflict with this Court's First Amendment jurisprudence. In *NAACP* v. *Claiborne Hardware*, 458 U.S. 886 (1982), this Court used virtually identical language to describe the *protected* actions of the defendants therein. They "sought to *persuade*" through non-violent " 'threat[s]' " that may have "coerce[d]" others into action. 458 U.S. at 910 (emphasis added); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971) ("The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment"); *cf. United States* v. *Kozminski*, 487 U.S. 931, 108 S.Ct. 2751, 2760-63 (1988) (involuntary servitude under Thirteenth Amendment and 18 U.S.C. § 1584 requires use or threatened use of physical or legal coercion, not psychological coercion).

Most courts which have addressed the question have held that a religious organization cannot be liable in tort for such a claim, because to do so would not only impose liability for

religious practices that do not justify government regulation, but also because judicial scrutiny of a religion's persuasiveness inevitably would involve scrutiny of the validity or credibility of a religion's dogma.[15] Indeed, at least three lower appellate courts in California expressly held that jury evaluation of claims of coercion persuasion or brainwashing inevitably results in jury evaluation of the believability or "truth" of the underlying religious beliefs, in violation of the principles of *United States* v. *Ballard*, 322 U.S. 78 (1944).[16]

Not all courts, however, have adopted this constitutionally necessary analysis. In *Molko*, *supra*, the California Supreme Court, in reversing the court of appeal, concluded that the "brainwashing" claim did raise a *triable* issue of fact, at least in the unique circumstances of that case. *Molko*, 46 Cal.3d at 1110-11, 1122. *Molko*, standing alone, arguably was based on the limited theory presented by the facts of that case that "fraudulent inducement [by concealing the Church's identity] into an atmosphere of coercive persuasion—the conduct at issue—is extreme and outrageous." *Molko*, 46 Cal.3d at 1122. The *Molko* court did not explicitly hold that "coercive persuasion" itself, without the secular fraud, would state an emotional distress claim. 46 Cal.3d at 1122.[17]

Recent actions of the California Supreme Court, however, including in this case, strongly suggest that that Court indeed

---

15 *See Meroni* v. *Holy Spirit Association*, 119 A.D.2d 200, 506 N.Y.S.2d 174, 177 (1986); *Lewis* v. *Holy Spirit Ass'n*, 589 F.Supp. 10, 12 (D.Mass. 1983); *Turner* v. *Unification Church*, 473 F.Supp. 367, 371 (D.R.I. 1978), aff'd, 602 F.2d 458 (1st Cir. 1979); *George*, *supra*, 262 Cal.Rptr. at 236; *Katz* v. *Superior Court*, 73 Cal.App.3d 952, 141 Cal.Rptr. 234, 255 (1977); *Guardianship of Polin*, 675 P.2d 1013 (Okla. 1983), *cert. denied*, 469 U.S. 850 (1984); *Baumgartner*, *supra*, 490 N.E.2d at 1326; *Christofferson*, *supra*, 644 P.2d at 590-91.

16 See *Katz*, *supra*, 73 Cal.App.3d at 987; *Estate of Supple*, 247 Cal.App.2d 410, 415, 55 Cal.Rptr. 542 (1966), *cert. denied*, 389 U.S. 820 (1967); *Molko* v. *Holy Spirit Association*, 179 Cal.App.3d 450, 224 Cal.Rptr. 817, 828 (1986), *reversed*, 46 Cal.3d 1092 (1988), *cert. denied*, 109 S.Ct. 67 (1989).

17 No such issue of fraudulent concealment of the Church's identity is at issue here.

construes *Molko* as creating a jury question as to whether claims of coercive persuasion are actionable as outrageous conduct. In *George* v. *International Society for Krishna Consciousness of California*, 213 Cal.App.3d 729, 262 Cal.Rptr. 217, 236-37 (1989) (softbound edition), the California Court of Appeal, Fourth District, reversed a multi-million dollar emotional distress judgment on behalf of an ex-member, which had been based in large part on the "coercive persuasion" testimony of Singer. The court of appeal narrowly construed *Molko*, holding that "[t]ort liability based on dietary restrictions, *methods of worship*, and communal living arrangements and schedules is just as surely inimical to the free exercise of religious liberty as that based on threats of divine retribution." 262 Cal.Rptr. at 236 (emphasis added).

The attempt of the *George* court to limit *Molko* to its facts, however, has been blocked by the California Supreme Court, which has just decertified *George* as precedent. *See Cal. Law Weekly* at 79, *reported in* 265 Cal.Rptr. No. 3 (Feb. 2, 1990). When combined with the California Supreme Court's refusal to review the decisions in this case, in *Witt* v. *Church Universal & Triumphant, Inc.*, No. B021187 (Cal. Ct.App. 1989), *rev. denied*, No. S010386 (Cal.S.Ct. June 28, 1989), *cert. denied*, 58 U.S.L.W. 3449 (Jan. 16, 1990), and in the *George* case itself, the message to California lower courts is inescapable: claims that the peaceful religious practices and indoctrination techniques of unorthodox religions constitute coercive persuasion and outrageous conduct may be resolved by juries, without constitutional limitation, *just as they were in the instant case.*

Nor is California alone in striking out on this dangerous road to state-sanctioned religious intolerance. In *O'Neil* v. *Schuckardt*, 112 Idaho 472, 733 P.2d 693, 699-701 (1986), the Idaho Supreme Court held that evidence of "rigid [religious] indoctrination", including "long hours in prayer, often kneeling", fasting, and isolation from outside communications, presented a jury question as to whether a conservative schismatic Catholic church engaged in "behavior [which] was intentional, wrongful, and an intrusion [of privacy]." *Id.* at 700. Not surprisingly, the jury found that the actions were

tortious, and the Idaho Supreme Court upheld the verdict. In *Carrieri* v. *Bush*, *supra*, the Washington Supreme Court held that a jury could find—as it did—that peaceful religious teachings and practices constitute the tort of alienation of affections.[18] *See also Peterson* v. *Sorlien*, 299 N.W.2d 123, 129 (Minn. 1980) ("cult indoctrination, viewed in a light most favorable to the prevailing party, is predicated on a strategy of coercive persuasion that undermines the capacity for informed consent"), *cert. denied*, 450 U.S. 1031 (1981).

This Court has never reviewed a case involving a church's tort liability for the church's peaceful religious practices. The Court should grant certiorari to insure that proper constitutional standards are applied and to make clear that, just as with political speech, juries should not be permitted to draw the line between protected and unprotected religious practice by application of the vague and uncertain standard of "outrageous conduct". *Hustler Magazine* v. *Falwell*, *supra*.

*II. The decision of the Court of Appeal is in fundamental conflict with the decisions of this court and other appellate courts holding that a judgment must be reversed where it may have rested upon grounds impermissible under the first amendment.*

The court of appeal recognized that the judgment would be barred by the First Amendment if it rested upon the theory that auditing, *per se*, constituted outrageous conduct (which, of course, was precisely the plaintiff's theory): "[The Constitution] cannot tolerate lawsuits which might chill religious practices—*such as auditing*, 'hell fire and damnation' preaching, confessions and the like—where the only harm which occurs is emotional injury to the psychologically weak." (24a) (emphasis added).

---

18 The rules of the California, Idaho and Washington state courts thus are in direct conflict with the rule of the United States Court of Appeals for the Ninth Circuit, as stated in *Paul* v. *Watchtower Bible and Tract Society*, 819 F.2d at 880, 883: "[i]ntangible or emotional harms cannot ordinarily serve as a basis for maintaining a tort cause of action against a church for its practices—or against its members".

The court of appeal did not deny that the "auditing *per se*" theory was presented to the jury, or that it, at the least, may have been the basis for the jury's verdict. Indeed, the court of appeal ignored the fact that the Church sought a jury instruction that auditing, *per se*, could not be the basis for a finding of tortious conduct, and that the instruction was refused (App. A305, 309-10, 312). Rather, the court of appeal found that there was evidence from which the jury *could* have based its verdict on the ground that plaintiff was compelled by force or secular threats to participate in auditing (25a). The court affirmed the judgment exclusively upon the possibility that the jury's verdict rested on such a secular coercion theory, despite the fact that the jury was not instructed on such a theory.

The court of appeal thus turned upside down the rule uniformly applied in First Amendment speech cases requiring reversal of a general verdict if the verdict may have rested upon grounds protected by the First Amendment. *See, e.g., Stromberg* v. *California*, 283 U.S. 359, 367-68 (1931); *Gregory* v. *City of Chicago*, 394 U.S. 111, 113 (1969); *id.* at 123-124 (Black, J., concurring); *Street* v. *New York*, 394 U.S. 576, 586-590 (1969); *Thomas* v. *Collins*, 323 U.S. 516, 528-29 (1945).

The Court explicitly applied this rule to state court civil tort proceedings in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 289 (1964); *see also United Mine Workers* v. *Gibbs*, 383 U.S. 715, 732-35 (1966); *NAACP* v. *Claiborne Hardware, Co.*, 458 U.S. 886, 917-18 (1982). And other lower federal and state appellate courts have applied the rule in religious free exercise cases, in dramatic contrast to the decision below. *Founding Church of Scientology* v. *United States*, 409 F.2d 1146, 1164 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969) (where a jury's general verdict *may* have rested upon grounds improper for First Amendment reasons, a reviewing court will not pause to speculate whether the jury's verdict was actually reached on other, and permissible, grounds); *George* v. *ISKCON*, *supra*, 262 Cal.Rptr. at 240 (verdict must be reversed "where the record is insufficient to eliminate the possibility that a criminal or civil judgment is

based in whole or in part on conduct protected by the First Amendment"); *Christofferson* v. *Church of Scientology*, *supra*, 644 P.2d at 603-05.

In the present case, rather than reversing because the jury *may* have (indeed almost certainly) found liability on the basis of constitutionally protected activity such as auditing, the court of appeal affirmed because it purportedly found some evidence of unprotected activity that *might* support a verdict for intentional infliction of emotional distress.[19]

The court of appeal also ignored the related constitutional doctrine that a civil judgment must be reversed when the damages awarded have not been explicitly limited to those proximately caused by the unprotected conduct. *See*, *e.g.*, *Gibbs*, 383 U.S. at 730, 735. In the closely analogous *Claiborne Hardware* case, this Court held that "the nonviolent elements" of the defendents' politically motivated economic boycott were protected by the First Amendment, 458 U.S. at 915, and that "[o]nly those [business] losses proximately caused by unlawful conduct may be recovered." 458 U.S. at 918. Noting the hopeless admixture of evidence of business losses resulting from protected and unprotected activity, the Court reversed on the ground that the judgment may have rested, at least in part, on the defendants' exercise of their First Amendment rights:

> It is impossible to conclude that state power has not been exerted to compensate respondents for the direct consequences of nonviolent, constitutionally protected activity.

458 U.S. at 923.

---

19 It is a virtual certainty that the jury did not rest its decision on the court of appeal's secular coercion theory, because that theory was never presented to it. But even if the possibility exists that the jury might have applied this theory on its own, the verdict *must* be overturned, because the jury was not *limited* to, or even informed of, the coercion theory, and because the jury was not instructed that it could *not* base its verdict upon the plaintiff's participation, *per se*, in auditing. The jury therefore may (indeed, was extremely likely to) have rested its decision on the constitutionally impermissible grounds that the religious practices of auditing and disconnect *per se* were outrageous and actionable, as Wollersheim's counsel argued and as presented in the testimony of Wollersheim and his expert witnesses.

The purpose of this rule, too, is to insure that persons are not subject to judgments or damages for engaging in First Amendment protected activities, *even if* they may also have engaged in unprotected activities for which they may be liable. Because the jury in this case, as in *Claiborne Hardware* and *Gibbs*, was not carefully instructed that it could award damages only for injuries proximately caused by violence or threats of violence, or, at the least, from improper coercive activities, and because of the hopeless admixture of protected and purportedly unprotected activity, "[i]t is impossible to conclude that state power has not been extended to compensate [Wollersheim] for the direct consequences of nonviolent, constitutionally protected activity." 458 U.S. at 923. Certiorari should be granted to insure that the necessary rule of *Gibbs* and *Claiborne Hardware* is applied explicitly to religious free exercise cases.

*III. The decision of the Court of Appeal is in fundamental conflict with the decisions of this court holding that an appellate court must engage in independent review of the record where a judgment is based upon activity ordinarily protected by the First Amendment.*

The court of appeal acknowledged that the provision of auditing ordinarily is protected by the free exercise clause, but "stripped away" (18a), the Church's First Amendment protection in this case because it held that there was evidence upon which the jury could have found that the auditing was provided in a context of physical coercion and secular threats. In so holding, the court simply concluded there was "substantial evidence" to support its invented "coercion" theory (10a). While this may be an appropriate standard of review in an ordinary tort case, when First Amendment interests are at stake, this Court requires that an appellate court engage in an independent examination of the whole record to ensure that the judgment does not constitute a forbidden intrusion into activities protected by the First Amendment. *See Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984). Had the court undertaken the constitutionally mandated independent review of the evidence, it could not have upheld a finding of liability on this record.

The independent review standard mandates that the appellate court "is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded." *Bose*, 466 U.S. at 509-10. The mere fact that "the jury was properly instructed [which it was not in this case] and there is some evidence to support its findings," does not insulate a jury verdict from independent review. *Id.* at 507 (bracketed material added). The independent review requirement ensures that the factfinder has not improperly "cross[ed] the constitutional threshhold that bars the entry of any judgment." *Id.* at 511.

The independent review standard does not require independent review of every factual issue in the case, but only of those contextual factual issues which determine whether activity is within or without the zone of First Amendment protection.[20] Thus, the *Bose* Court noted that independent review is required to determine actual malice in a defamation action (*New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964)); whether a motion picture is obscene (*Jenkins* v. *Georgia*, 418 U.S. 153, 159-61 (1974)); and whether speech was likely to incite imminent lawless action (*Hess* v. *Indiana*, 414 U.S. 105, 108-09 (1973)), or to cause an actual breach of the peace (*Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963)).[21] *Bose*, 466 U.S. at 506-08.

---

20 Thus, on direct appeal of the jury verdict below, the independent review standard was not at issue. Both parties recognized that liability had been imposed for Wollersheim's participation in auditing, *per se*, and there was no need for an independent review of the *evidence*, the Church's position being that the theory of liability was unconstitutional. *Only* when the court of appeal agreed with the Church's basic proposition, but nevertheless affirmed on its contextual secular coercion theory, did the independent review issue arise, *i.e.*, whether an independent review of the evidence would sustain the court's opinion that Wollersheim engaged in auditing out of threats or fear of retribution.

21 The Court also approvingly cited the application of independent evidentiary review in *Cantwell* v. *Connecticut*, 310 U.S. 296, 311 (1940) (free exercise of religion); *Street* v. *New York*, 394 U.S. 576, 592 (1969) (fighting words); *Fiske* v. *Kansas*, 274 U.S. 380, 385-87 (1927) (advocacy of violence).

Application of the standard is well illustrated by *Claiborne Hardware*, *supra*, where the question was whether and to what extent acts of violence and threats had coerced participation in a politically motivated economic boycott, thereby stripping First Amendment protection from all or part of the boycott activities. The Court held that the "fact that such activity is constitutionally protected [but for the alleged violent coercion] . . . imposes a special obligation on this Court to examine critically the basis on which liability was imposed," 458 U.S. at 915, requiring the court to carry out an "independent examination of the entire record" to ensure that the judgment did not violate First Amendment standards. *Id.* at 915 n.50.

Here, the court of appeal acknowledged that non-coerced auditing is protected by the First Amendment, just as a nonviolent boycott was deemed protected in *Claiborne Hardware*. The question here became whether and to what extent purported acts of coercion stripped First Amendment protection from the auditing activities, just as in *Claiborne Hardware* the question was whether and to what extent violence and threats of violence deprived the boycott activities of First Amendment protection. In sharp contrast to this Court's review in *Claiborne Hardware*, however, the court of appeal here did not independently examine the record, "critically" or otherwise, but instead merely determined (without reference to a single record fact) that the jury *may* have found "substantial evidence" to support the coercion theory, which, unlike *Claiborne Hardware*, was not even presented at trial. As is made clear from the statement of the case, independent review of the record would not have permitted the court of appeal to affirm on the basis of its coercion theory.

The failure of appellate courts to apply *Bose*-type review in free exercise cases makes it all too easy for plaintiffs to avoid the strictures of the free exercise clause in religious tort cases.

---

*Bose*, 466 U.S. at 505-06 & n.24; *see also Neimotko* v. *Maryland*, 340 U.S. 268, 271 (1951) (freedom of speech and religion) (cited with approval in *Harte-Hanks Communications, Inc.* v. *Connaughton*, 109 S.Ct. 2678, 2695 n.33 (1989)).

Plaintiffs will remain free, as here, to inflame a jury predominantly on the assertion that an unorthodox religious practice is somehow bad or harmful, so long as there is some evidence of coercion upon which an appellate court could speculate that the jury founded its verdict. Meaningful and searching review of the record in such cases is an absolute necessity to insure that the substantive protections of the free exercise clause are applied in a meaningful fashion.

*IV. This case presents the important question whether an award of punitive damages against a Church for providing its central religious practice to a parishioner violates the First Amendment.*

The court of appeal acknowledged that " 'auditing' qualifies as a 'religious practice'," and recognized auditing's central religious role in Scientology (23a). Nevertheless, the court held that "the state has a compelling interest in allowing its citizens to recover for serious emotional injuries they suffer *through religious practices* they are coerced into accepting" (30a) (emphasis added). The court below, therefore, clearly allowed recovery not merely for injuries caused by coercion, but for harms purportedly caused by the concededly religious practices themselves.

As the court of appeal also recognized, the state's interest in providing compensation for emotional injuries arising out of religious practices must be compelling or overriding and "the type and level of burden imposed must be the *minimum* required to achieve the state interest" (14a) (emphasis added). *See, e.g., Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972). However, the court ignored the decisions of this Court that the states lack a compelling interest in allowing the imposition of punitive damages in First Amendment cases or in other cases where strong public interests are at stake. Thus, in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court disallowed punitive damages in a libel action brought by a "non-public figure." The Court held that "the states have *no substantial interest* in securing for plaintiffs . . . gratuitous awards of [punitive] money damages far in excess of any actual injury." *Id.* at 349 (emphasis added). The

Court recognized that, consistent with the First Amendment, "state remedies [must] reach no farther than is necessary to protect the legitimate interest involved." *Id.* The Court identified a particular danger in allowing juries to assess punitive damages against the expression of minority views: "[Juries] remain free to use their discretion selectively to punish expressions of unpopular views." *Id.* at 350; *cf. Falwell*, 485 U.S. at 55 (subjective " 'outrageousness' standard" "would allow a jury to impose liability . . . on the basis of the jurors . . . dislike of a particular expression"). In this case, the jury's "preposterous" award of $25,000,000 in punitive damages (43a) clearly "punish[ed] expressions of unpopular [religious] views." *Gertz*, 418 U.S. at 350; *see also International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 50-51 (1979) (no punitive damages against labor unions in duty of fair representation cases); *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (barring punitive damages against municipalities in actions under 42 U.S.C. § 1983).

Just as in *Gertz*, *Foust*, and *Newport*, the punitive damage award against the Church for harms caused by its central religious activity serves no legitimate, let alone compelling, government interest. Punishment for religious practices by means of ruinous punitive damage awards is a clear and direct infringement of a Church's and its members' right to the free exercise of their religion, and selectively deters religious activity and excessively entangles the government in the intent, motives, and beliefs of church officials in violation of the Establishment Clause. As in *Newport* and *Foust*, where the ultimate victims would be taxpayers and union members, the true victims of punitive awards here are the Church members. Even if the acts complained of were to be deemed tortious, the compensatory damage award makes Wollersheim whole for his actual injuries (41a).[22]

---

22 The Church does not claim that a religious organization can never be liable for punitive damages, but only that the state's "compelling interest in allowing its citizens to recover for serious emotional injuries they suffer *through religious practices*," (30a) (emphasis added), whether or not participation is "coerced," must be limited to actual compensatory damages.

*V. This case presents the recurring fundamental question whether the standardless award of punitive damages violates constitutional due process.*

California law, as applied here, woefully fails to provide standards for determining whether and what punitive damages should be awarded. Indeed, the trial court instructed the jury, in the language of BAJI 14.71, that "[t]he law provides no fixed standard" for their decision (RT 14,796). The factors which the jury is to consider are vaguely defined, if at all, and, indeed, the cases show extraordinary disparity in the size of awards, the relation of award to defendant's net worth, and the ratio between actual and punitive damages, without any apparent relationship to the type of conduct being punished. The absence of more specific guidance leads to the all-too-common phenomenon of runaway jury awards, as happened here. Even assuming a legitimate state interest in permitting punitive damages for peaceful religious practices, the absence of standards in the imposition of the enormous financial penalty here violates the Fourteenth Amendment's guarantee of due process. The action by the court below in reducing the damage award from a "preposterous" $25,000,000 to a massive $2,000,000, not only fails to cure, but rather highlights, the due process violation. While the court concluded that the jury's $25 million punitive damages award was "preposterous" (41a-43a), it could provide no rationale as to the propriety of a $2,000,000 award.[23] Both the jury verdict and the court of appeal's new figure were the

---

23 The jury's standardless discretion was exacerbated here by the trial court's refusal to give, despite the Church's explicit request, what appeared to be a statutorily mandated jury instruction (BAJI 14.73) that punitive damages may be assessed against a corporation only when an officer, director, or managing agent directs or ratifies the underlying acts of the agents or employees of the corporation, Cal.Civ.Code § 3294(b) (as amended 1980), not on the *respondeat superior* theory given by the trial court (RT 14,783-84). The failure of *any* state court even to address this repeatedly argued issue in this case demonstrates not only the lack of standards for the jury in *the amount* of punitive damages, but also the complete discretion of the courts in choosing *the method* by which punitive damages are imposed—pursuant to acts directly of the corporation under BAJI 14.73, or pursuant to a *respondeat superior* theory.

product of a system that provides juries and appellate courts with standardless discretion to award whatever amount they wish.

Three years ago, this Court, in an opinion by Chief Justice Burger, acknowledged that the question whether the "lack of sufficient standards governing punitive damage awards" violates due process is an "important issue[ ] which, in an appropriate setting, must be resolved." *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 828-29 (1986). Last Term, in *Browning-Ferris Industries, Inc.* v. *Kelco Disposal, Inc.*, 109 S.Ct. 2909 (1989), four Justices explicitly stated that the Due Process Clause constrained not only the size of punitive damage awards, but also "the method by which they are imposed." 109 S.Ct. at 2924 (O'Connor, J. concurring in part and dissenting in part, joined by Stevens, J.); *id.* at 2923 (Brennan, J. concurring, joined by Marshall, J.) ("instruction reveals a due process flaw: . . . punitive damages are imposed by juries guided by little more than an admonition to do what they think is best"). The majority opinion also stated that the argument that the Due Process Clause "acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit" remains an open question. *Id.* at 2921.[24]

In light of *Aetna* and *Browning-Ferris*, the "preposterous" jury verdict, the absence of any explanation for the court of appeal's $2,000,000 award, and the apparent discretion of California courts to give or to refuse a statutory instruction on corporate liability for punitive damages, this Court should grant review to determine whether the punitive damage award and "the method by which [it was] imposed," 109 S.Ct. at 2924, violated the Church's due process rights.

---

24 The Court was unanimous in *Browning-Ferris* that the due process question was not properly before it. The Court held only that the Eighth Amendment excessive fines clause did not apply to an award of punitive damages under state law. 109 S.Ct. at 2914.

## CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Dated: February 23, 1990

Respectfully submitted,

ERIC M. LIEBERMAN
Counsel of Record
DAVID B. GOLDSTEIN
RABINOWITZ, BOUDIN,
STANDARD, KRINSKY &
LIEBERMAN, P.C.
740 Broadway-Fifth Floor
New York, New York 10003-9518
(212) 254-1111

MICHAEL LEE HERTZBERG
740 Broadway-Fifth Floor
New York, New York 10003
(212) 982-9870

*Attorneys for Petitioner Church of Scientology of California*

# APPENDIX

## APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

SO11790

---

LARRY WOLLERSHEIM,

*Respondent*,

—v.—

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

*Appellant*.

---

ORDER DENYING REVIEW

Order Filed October 26, 1989

AFTER JUDGMENT BY THE COURT OF APPEALS
Second Appellate District, Division Seven,
No. B023193

Appellant's and respondent's petitions for review DENIED.

## APPENDIX B

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

B023193

Filed: August 17, 1989

(LASC No. C332827)

LARRY WOLLERSHEIM,
*Plaintiff and Respondent,*

—v.—

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
*Defendant and Appellant.*

### ORDER MODIFYING OPINION AND DENYING REHEARING

THE COURT:

It is ordered that the opinion filed herein on July 18, 1989, be modified in the following particulars:

On page 2, line 4 of the first paragraph change the word "appellants" to "appellant." Thereafter, change the plural form "appellants" and "appellants' " to the singular form "appellant" and "appellant's" throughout the remainder of the opinion.

On page 2, line 9 of the first paragraph, change "they were" to "it was."

On page 7, line 1 of the second paragraph change "raise" to "raises".

On page 34, line 4 of the second paragraph change "church" to "Church."

On page 47, line 6 from the bottom of the page change "they were" to "it was." On line 2 from the bottom of the same page change "were able" to "was able".

On page 48, line 1 change "complain" to "complains" and in line 2, change "they" to "it".

On page 48, line 3 of the second paragraph change "they" to "appellant".

On page 49, line 10 change "complain" to "complains" and in line 11 change "their" to "its".

On page 50, line 10 change "complain" to "complains"; in line 11 change "they mention" to "it mentions"; in line 12 change "they accuse" to "it accuses"; in line 14 change "their brief appellants concede" to "its brief appellant concedes" and in line 16 change "they ask" to "it asks."

On page 51, line 7 change "object" to "objects."

In the second paragraph on the same page, line 1 change the word "complain" to "complains"; in line 3 change "their" to "its"; in line 4 change "provide" to "provides"; in line 6 change "They confine themselves" to "It confines itself"; in line 8 change "they expect" to "it expects" and in line 9 change "their" to "its."

On page 52, the first paragraph, line 1 change "their" to "its"; in line 2 change "set" to "sets", "their" to "its" and "they" to "it"; in line 3 change "allege" to "alleges" and line 11, change "their" to "its".

On page 56, line 7 replace the sentence commencing "This appears . . . ." with the following sentence:

> This ratio is well outside the permissible range established in other appellate cases.

On the same page, the last two lines on the page, replace the sentence commencing "We find it . . . ." with the following two sentences:

> Respondent asserts appellant's true net worth approaches $250 million not $16 million and thus the punitive damage award is not excessive. However,

respondent failed to prove the higher net worth figure at trial.

Appellant's petition for rehearing is denied. Respondent's petition for rehearing is denied.

No change in judgment.

CERTIFIED FOR PUBLICATION

## APPENDIX C

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

B023193

Filed: July 18, 1989

(LASC No. C332827)

---

LARRY WOLLERSHEIM,
*Plaintiff and Respondent,*

—v.—

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
*Defendant and Appellant.*

---

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald Swearinger, Judge. Modified, affirmed in part and reversed in part.

Rabinowitz, Boudin, Standard, Krinsky & Lieberman and Eric M. Lieberman and Terry Gross, Lenske, Lenske & Heller and Lawrence E. Heller, and Michael Lee Hertzberg for Defendant and Appellant.

Greene, O'Reilly, Broillet, Paul, Simon, McMillan, Wheeler & Rosenberg and Charles B. O'Reilly for Plaintiff and Respondent.

Boothby, Ziprick & Yingst and William F. Ziprick, Lee Boothby and James M. Parker as Amicus Curiae on behalf of Defendant and Appellant.

This appeal arises after a jury awarded $30 million in compensatory and punitive damages to a former member of the Church of Scientology (the Church). The complaint alleged appellants intentionally and negligently inflicted severe emotional injury on respondent through certain practices, including "auditing," "disconnect," and "fair game." Since the trial court granted summary adjudication that Scientology is a religion and "auditing" is a religious practice, the trial proceeded under the assumption they were. We conclude there was substantial evidence to support a factual finding the "auditing," as well as other practices in this case, were conducted in a coercive environment. Thus, none of them qualified as "*voluntary* religious practices" entitled to constitutional protection under the First Amendment religious freedom guarantees. At the same time, we conclude both the compensatory and punitive damages the jury awarded in this case are excessive. Consequently, we modify the judgment to reduce both of these damage awards.

## FACTS AND PROCEEDINGS BELOW

Construing the facts most favorably to the judgment, as we must, respondent Larry Wollersheim was an incipient manic-depressive for most of his life. Appellants Scientology and its leaders were aware of Wollersheim's susceptibility to this mental disorder: What appellants did to him during and after his years in Scientology aggravated Wollersheim's mental condition, driving him into deep depressive episodes and causing him severe mental anguish. Furthermore, Scientology engaged in a practice of retribution and threatened retribution—often called "fair game"—against members who left or otherwise posed a threat to the organization. This practice coerced Wollersheim into continued participation in the other practices of Scientology which were harming him emotionally.

Wollersheim first became acquainted with Scientology in early 1969 when he attended a lecture at the "Church of Scientology of San Francisco." During the next few months

he completed some basic courses at the San Francisco institution. He then returned to his home state of Wisconsin and did not resume his scientology training for almost two years.

When Wollersheim did start again it was at the appellant, Church of Scientology of California, headquartered in Los Angeles. From 1972 through 1979 Wollersheim underwent "auditing" at both the basic and advanced levels. In 1973 he worked several months as a staff member at the Church of Scientology Celebrity Center located in Los Angeles. In 1974, despite his repeated objections, Wollersheim was persuaded to participate in auditing aboard a ship maintained by Scientology. While on the ship, Wollersheim was forced to undergo a strenuous regime which began around 6:00 A.M. and continued until 1:00 the next morning. Further, Wollersheim and others were forced to sleep nine deep in the ship's hold. During his six weeks under these conditions, Wollersheim lost 15 pounds.

Wollersheim attempted to escape from the ship because he felt he "was dying and losing [his] mind." His escape was thwarted by Scientology members who seized Wollersheim and held him captive until he agreed to remain and continue with the auditing and other religious practices taking place on the vessel. One of the psychiatric witnesses testified Wollersheim's experience on the ship was one of five cataclysmic events underlying the diagnosis of his mental illness and its cause.

At another stage Scientology auditors convinced him to "disconnect" from his wife and his parents and other family members because they had expressed concerns about Scientology and Wollersheim's continued membership. "Disconnect" meant he was no longer to have any contact with his family.

There also was evidence of a practice called "freeloader debt." "Freeloader debt" was accumulated when a staff member received Church courses, training or auditing at a reduced rate. If the member later chose to leave, he or she was presented with a bill for the difference between the full price normally charged to the public and the price originally

charged to the member. Appellants maintained a "freeloader debt" account for Wollersheim.

During his years with Scientology Wollersheim also started and operated several businesses. The most successful was the last, a service which took and printed photographic portraits. Most of the employees and many of the customers of this business were Scientologists.

By 1979, Wollersheim's mental condition worsened to the point he actively contemplated suicide. Wollersheim began experiencing personality changes and pain. When the Church learned of Wollersheim's condition, Wollersheim was sent to the Flag Land Base for "repair."

During auditing at Flag Land Base, Wollersheim's mental state deteriorated further. He fled the base and wandered the streets. A guardian later arranged to meet Wollersheim. At that meeting, the guardian told Wollersheim he was prohibited from ever speaking of his problems with a priest, a doctor or a psychiatrist.

Ultimately Wollersheim became so convinced auditing was causing him psychiatric problems he was willing to risk becoming a target of "freeloader debt" and "fair game." Evidence was introduced that, at least during the time relevant to Wollersheim's case, "fair game" was a practice of retribution Scientology threatened to inflict on "suppressives," which included people who left the organization or anyone who could pose a threat to the organization. Once someone was identified as a "suppressive," all scientologists were authorized to do anything to "neutralize" that individual—economically, politically, and psychologically.

After Wollersheim left the organization Scientology leaders initiated a "fair game" campaign which among other things was calculated to destroy Wollersheim's photography enterprise. They instructed some Scientology members to leave Wollersheim's employ, told others not to place any new orders with him and to renege on bills they owed on previous purchases from the business. This strategy shortly drove Wollersheim's photography business into bankruptcy. His mental condition deteriorated further and he ended up under psychiatric care.

Wollersheim thereafter filed this lawsuit alleging fraud, intentional infliction of emotional injury, and negligent infliction of emotional injury. At the law-and-motion stage, a trial court granted summary adjudication on two vital questions. It ruled Scientology is a religion and "auditing" is a religious practice of that religion.

During trial, Wollersheim's experts testified Scientology's "auditing" and "disconnect" practices constituted "brain-washing" and "thought reform" akin to what the Chinese and North Koreans practiced on American prisoners of war. They also testified this "brain-washing" aggravated Wollersheim's bipolar manic depressive personality and caused his mental illness. Other testimony established Scientology is a hierarchical organization which exhibits near paranoid attitudes toward certain institutions and individuals—in particular, the government, mental health professions, disaffected members and others who criticize the organization or its leadership. Evidence also was introduced detailing Scientology's retribution policy, sometimes called "fair game."

After the evidence was heard, the trial judge dismissed the fraud count but allowed both the intentional and negligent infliction of emotional injury counts to go to the jury. The jury, in turn, returned a general verdict in favor of plaintiff on both counts. It awarded $5 million in compensatory damages and $25 million in punitive damages. The motion for new trial was denied and appellants filed a timely appeal.

## DISCUSSION

Appellants raise a broad spectrum of issues all the way from a technical statute of limitations defense to a fundamental constitutional challenge to this entire species of claims against Scientology. If the narrower grounds of appeal had merit and disposed of the case we could avoid confronting the difficult constitutional questions. But since they do not we must consider Scientology's religious freedom claims.

## I. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT WOLLERSHEIM'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

The cause of action for intentional infliction of emotional injury formed the centerpiece of the case which went to the jury. This claim actually cumulates four courses of conduct which together allegedly inflicted severe emotional damage on the psychologically weak Wollersheim. These courses of conduct are: (1) subjecting Wollersheim to forms of "auditing" which aggravated his predisposition to bipolar mania-depression; (2) psychologically coercing him to "disconnect" from his family; (3) "disclosing personal information" Wollersheim revealed during auditing under a mantle of confidentiality; and, (4) conducting a retributive campaign ("fair game") against Wollersheim and particularly against his business enterprise.

The tort of intentional infliction of emotional distress was created to punish conduct " 'exceeding all bounds usually tolerated by a decent society, of a nature which is especially calculated to cause, and does cause, mental distress.' " (*Agarwal* v. *Johnson* (1979) 25 Cal.3d 932, 946.) A prima facie case requires: (1) outrageous conduct by the defendant; (2) an intention by the defendant to cause, or the reckless disregard of the probability of causing, emotional distress; (3) severe emotional distress; and (4) an actual and proximate causation of the emotional distress. (*Nally* v. *Grace Community Church* (1988) 47 Cal.3d 278, 300.)

"Behavior may be considered outrageous if a defendant (1) abuses a relation or position which gives him power to damage the plaintiff's interest; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress." (*Agarwal* v. *Johnson*, *supra*, 25 Cal.3d at p. 946.)

There is substantial evidence to support the jury's finding on this theory. First, the Church's conduct was manifestly outrageous. Using its position as his religious leader, the Church and its agents coerced Wollersheim into continuing

"auditing" although his sanity was repeatedly threatened by this practice. (See pp. 29-33, *infra.*) Wollersheim was compelled to abandon his wife and his family through the policy of disconnect. When his mental illness reached such a level he actively planned his suicide, he was forbidden to seek professional help. Finally, when Wollersheim was able to leave the Church, it subjected him to financial ruin through its policy of "fair game".

Any one of these acts exceeds the "bounds usually tolerated by a decent society," so as to constitute outrageous conduct. In aggregate, there can be no question this conduct warrants liability *unless it is privileged as constitutionally protected religious activity.* (See pp. 11-17, *infra.*)

Second, the Church's actions, if not wholly calculated to cause emotional distress, unquestionably constituted reckless disregard for the likelihood of causing emotional distress. The policy of fair game, by its nature, was intended to punish the person who dared to leave the Church. Here, the Church actively encouraged its members to destroy Wollersheim's business.

Further, by physically restraining Wollersheim from leaving the Church's ship, and subjecting him to further auditing despite his protests, the Church ignored Wollersheim's emotional state and callously compelled him to continue in a practice known to cause him emotional distress.

Third, Wollersheim suffered severe emotional distress. Indeed, his distress was such that he actively considered suicide and suffered such psychiatric injury as to require prolonged professional therapy. (See *Fletcher* v. *Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 397 [severe emotional distress "may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry"].)

Finally, there is substantial evidence the Church's conduct proximately caused the severe emotional distress. Wollersheim's bankruptcy and resulting mental distress was the direct result of the Church's declaration that he was fair game. Additionally, according to the psychiatric testimony

auditing and disconnect substantially aggravated his mental illness and triggered several severe depressive episodes.

In sum, there is ample evidence to support the jury's verdict on Wollersheim's claim for intentional infliction of emotional distress. This, however, does not conclude our inquiry. As we discuss below, Wollersheim's action may nonetheless be barred if we conclude the Church's conduct was protected under the free exercise clause of the First Amendment.

## II. CONSTITUTIONAL RELIGIOUS FREEDOM GUARANTEES DO NOT IMMUNIZE SCIENTOLOGY FROM LIABILITY FOR ANY OF THE ACTIONS ON WHICH WOLLERSHEIM'S INTENTIONAL INFLICTION OF EMOTIONAL INJURY CAUSE OF ACTION IS BASED

Scientology asserts all four courses of conduct comprising the intentional infliction claim are forms of religious expression protected by the Freedom of Religion clauses of the United States and California Constitutions. We conclude some would not be protected religious activity even if Wollersheim freely participated. We further conclude none of these courses of conduct qualified as protected religious activity in Wollersheim's case. Here they occurred in a coercive atmosphere appellants created through threats of retribution against those who would leave the organization. To explain our conclusions it is necessary to examine the parameters and rationale of the religious freedom provisions in some depth.

### A. *The Basic Principles of the "Free Exercise" Clause*

Religious freedom is guaranteed American citizens in just 16 words in the First Amendment. "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise* thereof; . . ." (U.S. Const., Amend. I, italics added.[1].)

---

1 All discussion in this opinion as to the freedom of religion provisions of the U.S. Constitution applies also to appellants' claims under article I, section 4 of the California Constitution which guarantees "[f]ree exercise and enjoyment of religion without discrimination or preference."

When it was adopted, the First Amendment only applied to the federal government, not the states. (U.S. Const., 1st Amend. ["*Congress* shall make no law . . ."], emphasis added; see *Permoli v. First Municipality* (1845) 44 U.S. 589, 609.) However, following ratification of the Fourteenth Amendment, the First Amendment protections became enforceable against the states via the Fourteenth Amendment's due process clause. (*California v. Grace Brethren Church* (1982) 457 U.S. 393, 396 fn. 1; *Everson v. Board of Education* (1947) 330 U.S. 1, 8.)

"[T]he application of tort law to activities of a church or its adherents in their furtherance of their religious belief is an exercise of state power. When the imposition of liability would result in the abridgement of the right to free exercise of religious beliefs, recovery in tort is barred." (*Paul v. Watchtower Bible & Tract Soc. of New York* (9th Cir. 1987) 819 F.2d 875, 880; accord *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1114 ["judicial sanctioning of tort recovery constitutes state action sufficient to invoke the same constitutional protections applicable to statutes and other legislative actions"]; see *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 277.)

As can be seen, the First Amendment creates two very different protections. The "establishment clause"—actually an "*anti*-establishment clause"—guarantees us the government will not use its resources to impose religion on us. The "free exercise clause," on the other hand, guarantees us government will not prevent its citizens from pursuing any religion we choose.

The "establishment clause" comes into play when a government policy has the effect of promoting religion—as by financing religious schools or requiring religious prayers in public schools, and the like. These policies violate the establishment clause unless they survive a three-part test. They must have a secular purpose. Their primary effects must be ones which neither advance nor inhibit religion. And they must avoid any excessive entanglements with religion. (*Lemon* v. *Kurtzman* (1971) 403 U.S. 602, 612-613; see also *Committee for Public Education v. Nyquist* (1973) 413 U.S.

756, 773; *Abington School Dist. v. Schempp* (1963) 374 U.S. 203, 222.) The "free exercise clause," in contrast to the "establishment clause," was adopted without debate or comment when the First Congress deliberated the Bill of Rights. (Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment (1976).) Thus the courts have turned to other writings by those responsible for the Bill of Rights, especially James Madison and Thomas Jefferson, to divine the meaning of "free exercise of religion."

The subsequent cases interpreting these four words make it clear that while the free exercise clause provides absolute protection for a person's religious *beliefs*, it provides only limited protection for the *expression* of those beliefs and especially *actions* based on those beliefs. (*Cantwell* v. *Connecticut* (1940) 310 U.S. 296, 303-304.) Freedom of belief is absolutely guaranteed, freedom of action is not. Thus government cannot constitutionally burden any belief no matter how outlandish or dangerous. But in certain circumstances it can burden an expression of belief which adversely affects significant societal interests. To do so, the burden on belief must satisfy a four-part test: First, the government must be seeking to further an important—and some opinions suggest a compelling—state interest. Secondly, the burden on expression must be essential to further this state interest. Thirdly, the type and level of burden imposed must be the minimum required to achieve the state interest. Finally, the measure imposing the burden must apply to everyone, not merely to those who have a religious belief; that is, it may not discriminate against religion.

A straightforward exposition of three prongs of this test is found in *United States* v. *Lee* (1981) 455 U.S. 252, 257-258 where the Supreme Court held: "The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest. (Citations omitted.)" All four are mentioned in *Braunfeld* v. *Brown* (1961) 366 U.S. 599, 607: "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid . . . . But if the State regulates conduct by

enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden." (See also *Thomas* v. *Review Bd., Ind. Empl. Sec. Div.* (1981) 450 U.S. 707, 717-718; *Wisconsin* v. *Yoder* (1972) 406 U.S. 205, 220; *Gillette* v. *United States* (1971) 401 U.S. 437, 462; *Sherbert* v. *Verner* (1963) 374 U.S. 398, 402-403; *Cantwell* v. *Connecticut*, *supra*, 310 U.S. at pp. 304-305.)

A review of the Supreme Court's "free exercise" rulings also makes it apparent the four critical factors are interrelated. Roughly speaking, the heavier the burden the government imposes on the expression of belief and the more significant the particular form of expression which is burdened, the more important the state interest must be. Or to put it the other way around, the more important the interest the state seeks to further, the heavier the burden it can constitutionally impose on the more important forms of expressing religious belief. Thus, only the most compelling of state interest—such as the preservation of life or of the state itself—will justify an outright ban on an important method of expressing a religious belief. (See, e.g., *Reynolds* v. *United States* (1878) 98 U.S. 145, 164 [polygamy can be outlawed even though a central religious tenet of the Mormon religion because it "has always been odious among the northern and western nations of Europe, . . . and from the earliest history of England has been treated as an *offence against society.*" [Italics added.]; *Prince* v. *Massachusetts* (1943) 321 U.S. 158, 170 [parents can be prohibited from allowing their children to distribute religious literature even though this is a religious duty required in order to avoid "everlasting destruction at Armageddon" where necessary to protect the health and safety of youth]; *Jacobson* v. *Massachusetts* (1904) 197 U.S. 11, 26 [adults and children can be compelled to be vaccinated for communicable diseases even though their religious beliefs oppose vaccination because as was observed in *Prince* v. *Massachusetts*, *supra*, 321 U.S. at pp. 166-167, "'[T]he right to practice religion freely does not include liberty to expose

the community or the child to communicable disease or the latter to ill health or death"].)

But a less significant state interest may be enough where the burden is less direct or the form of expression less central to the exercise of the particular religion. (See, e.g., *Goldman* v. *Weinberger* (1986) 475 U.S. 503, 509-510 where the military's apparently rather marginal interest in absolutely uniform attire was enough to justify an outright ban against a Jewish officer's apparently rather marginal form of religious expression in wearing a yarmulke [a religious cap] indoors.) In *Bowen* v. *Roy* (1986) 476 U.S. 693, disapproved on other grounds in *Hobbie* v. *Unemployment Appeals Commission* (1987) 480 U.S. 136, 141, the U.S. Supreme Court found the Federal government's interest in administrative convenience in preventing fraud in a benefit program was enough to justify the minimal burden of denying benefits to those who because of religious beliefs refuse to obtain and reveal social security numbers. *Braunfeld* v. *Brown*, *supra*, 366 U.S. 599, 605 [governmental interest in prohibiting economic activity on Sundays is enough to justify imposing the burden of an economic loss on those orthodox Jews who choose to exercise their religious belief that they not work on Saturdays and thus lose two rather than only one day's opportunity to earn money. "[T]he case before us . . . does not make *unlawful* any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs *more expensive*"], italics added.)

We now apply the above principles to the four courses of conduct alleged in Wollersheim's intentional infliction of emotional injury cause of action. To be entitled to constitutional protections under the Freedom of Religion clauses any course of conduct must satisfy three requirements. First, the system of thought to which the course of conduct relates must qualify as a "religion" not a philosophy or science or personal preference. Thus, it is unlikely a psychiatrist could successfully shield himself from malpractice by asserting he was merely practicing the "religion" of psychotherapy and following the "religious" teachings of Freud and Jung. Sec-

ondly, the course of conduct must qualify as an expression of that religion and not just an activity that religious people happen to be doing. Thus, driving a Sunday School bus does not constitute a religious practice merely because the bus is owned by a religion, the driver is an ordained minister of the religion, and the bus is taking church members to a religious ceremony. (See *Malley* v. *Fong* (1951) 37 Cal.2d 356, 373 [religious organization held liable for employee's negligent driving]; *Meyers* v. *S.W. Reg. Con. Ass'n. of Seventh Day Adv.* (La. 1956) 88 So.2d 381, 386 [First Amendment does not bar minister's workers' compensation action against church for injuries arising from auto accident which occurred when minister was traveling to church conference].) And, thirdly, the religious expression must not inflict so much harm that there is a compelling state interest in discouraging the practice which outweighs the values served by freedom of religion. Thus, the fact polygamy was a central practice of the Mormon religion was not enough to qualify it for constitutional protection from state governments which desired to ban this practice.

This means we must first ask three questions as to each of the four courses of conduct Wollersheim alleged against Scientology. (1) Does Scientology qualify as a religion? (2) If so, is the course of conduct at issue an expression of the religion of Scientology? (3) If it is, does the public nevertheless have a compelling secular interest in discouraging this course of conduct even though it qualifies as a religious expression of the Scientology religion? After answering these three questions, however, the special circumstances of this case require us to ask a fourth. Did Wollersheim participate in this course of conduct voluntarily or did Scientology coerce his continued participation through the threat of serious sanctions if he left the religion?

The threshold question for all four courses of conduct is whether Scientology qualifies as a religion. As will be recalled, at the law-and-motion stage, a judge granted summary adjudication on this issue. That court ruled Scientology indeed was a religion. And at the trial stage, another judge

reinforced this ruling by submitting the case to the jury with an instruction that Scientology is a religion.

As a result of the law-and-motion judge's decision on this question, evidence was not introduced at trial on the specific issue of whether Scientology is a religion. Given that vacuum of information, it would be presumptuous of this court to attempt a definitive decision on this vital question. We note other appellate courts have observed this remains a very live and interesting question. (See *Founding Church of Scientology* v. *United States* (D.C.Cir. 1969) 409 F.2d 1146, 1160-1161; *Founding Church of Scientology* v. *Webster* (D.C.Cir. 1986) 802 F.2d 1448, 1451 ["whether Scientology is a religious organization, a for-profit private enterprise, or something far more extraordinary [is] an intriguing question that this suit does not call upon us to examine . . . ."].) However, we have no occasion to go beyond a review of the summary adjudication decision the trial court reached at the law-and-motion stage. In reviewing this decision, we find that on the evidence before the court the judge properly ruled Scientology qualifies as a religion within the meaning of the Freedom of Religion Clauses of the United States and California Constitutions.

This brings us to the remaining three questions as to each of the four courses of conduct: Is the conduct a "religious practice"? If so, is there a compelling secular interest in requiring compensation for the injuries attributable to that practice? If the constitutional immunity is not overridden by a compelling state interest in the ordinary situation, is it nevertheless stripped away here because the religion coerced the injured member into continuing his participation in the practice?

B. *Even Assuming the Retributive Conduct Sometimes Called "Fair Game" Is a Core Practice of Scientology It Does Not Qualify for Constitutional Protection*

As we have seen, not every religious expression is worthy of constitutional protection. To illustrate, centuries ago the

inquisition was one of the core religious practices of the Christian religion in Europe. This religious practice involved torture and execution of heretics and miscreants. (See generally Peters, Inquisition (1988); Lea, The Inquisition of the Middle Ages (1961).) Yet should any church seek to resurrect the inquisition in this country under a claim of free religious expression, can anyone doubt the constitutional authority of an American government to halt the torture and executions? And can anyone seriously question the right of the victims of our hypothetical modern day inquisition to sue their tormentors for any injuries—physical or psychological—they sustained?

We do not mean to suggest Scientology's retributive program as described in the evidence of this case represented a full-scale modern day "inquisition." Nevertheless, there are some parallels in purpose and effect. "Fair game" like the "inquisition" targeted "heretics" who threatened the dogma and institutional integrity of the mother church. Once "proven" to be a "heretic," an individual was to be neutralized. In medieval times neutralization often meant incarceration, torture, and death. (Peters, Inquisition, *supra*, pp. 57, 65-67, 87, 92-94, 98, 117-118, 133-134; Lea, The Inquisition of the Middle Ages, *supra*, pp. 181, 193-202, 232-236, 250-264, 828-829.) As described in the evidence at this trial the "fair game" policy neutralized the "heretic" by stripping this person of his or her economic, political and psychological power. (See, e.g., *Allard* v. *Church of Scientology* (1976) 58 Cal.App.3d 439, 444 [former church member falsely accused by Church of grand theft as part of "fair game" policy, subjecting member to arrest and imprisonment].)

In the instant case, at least, the prime focus of the "fair game" campaign was against the "heretic" Wollersheim's economic interests. Substantial evidence supports the inference Scientology set out to ruin Wollersheim's photography enterprise. Scientologists who worked in the business were instructed to resign immediately. Scientologists who were customers were told to stop placing orders with the business. Most significantly, those who owed money for previous orders were instructed to renege on their payments. Although

these payments actually were going to a factor not Wollersheim, the effect was to deprive Wollersheim of the line of credit he needed to continue in business.

Appellants argue these "fair game" practices are protected religious expression. They cite to a recent Ninth Circuit case upholding the constitutional right of the Jehovah's Witness Church and its members to "shun" heretics from that religion even though the heretics suffer emotional injury as a result. (*Paul* v. *Watchtower Bible & Tract Soc. of New York*, *supra*, 819 F.2d 875.) In this case a former Jehovah's Witness sued the church and certain church leaders for injuries she claimed to have suffered when the church ordered all other church members to "shun" her. In the Jehovah Witness religion, "shunning" means church members are prohibited from having any contact whatsoever with the former member. They are not to greet them or conduct any business with them or socialize with them in any manner. Thus, there was a clear connection between the religious practice of "shunning" and Ms. Paul's emotional injuries. Nonetheless, the trial court dismissed her case. The Ninth Circuit affirmed in an opinion which expressly held "shunning" is a constitutionally protected religious practice. "[T]he defendants, . . . possess an affirmative defense of privilege—a defense that permits them to engage in the practice of shunning pursuant to their religious beliefs without incurring tort liability." (*Id.* at p. 879.)

We first note another appellate court has taken the opposite view on the constitutionality of "shunning." (*Bear* v. *Reformed Mennonite Church* (Pa. 1975) 341 A.2d 105.) In this case the Pennsylvania Supreme Court confronted a situation similar to *Paul* v. *Watchtower Bible & Tract Soc. of New York*. The plaintiff was a former member of the Mennonite Church. He was excommunicated for criticizing the church. Church leaders ordered that all members must "shun" the plaintiff. As a result, both his business and family collapsed. The appellate court reversed the trial court's dismissal of the action, holding: "In our opinion, the complaint, . . . raises issues that the 'shunning' practice of appellee church and the conduct of the individuals may be an

excessive interference within areas of 'paramount state concern,' i.e., the maintenance of marriage and family relationship, alienation of affection, and the tortious interference with a business relationship, which the courts of this Commonwealth *may* have authority to regulate, even in light of the 'Establishment' and 'Free Exercise' clauses of the First Amendment." (*Bear* v. *Reformed Mennonite Church*, *supra*, 341 A.2d at p. 107, emphasis in original.)

We observe the California Supreme Court has cited with apparent approval the viewpoint on "shunning" expressed in *Bear* v. *Mennonite Church*, *supra*, rather than the one adopted in *Paul* v. *Watchtower Bible & Tract Soc. of New York*, *supra*. (See *Molko* v. *Holy Spirit Assn.*, *supra*, 46 Cal.3d 1092, 1114.) But even were *Paul* v. *Watchtower Bible & Tract Soc. of New York* the law of this jurisdiction it would not support a constitutional shield for Scientology's retribution program. In the instant case Scientology went far beyond the social "shunning" of its heretic, Wollersheim. Substantial evidence supports the conclusion Scientology leaders made the deliberate decision to ruin Wollersheim economically and possibly psychologically. Unlike the plaintiff in *Paul* v. *Watchtower Bible & Tract Soc. of New York*, Wollersheim did not suffer his economic harm as an unintended byproduct of his former religionists' practice of refusing to socialize with him any more. Instead he was bankrupted by a campaign his former religionists carefully designed with the specific intent it bankrupt him. Nor was this campaign limited to means which are arguably legal such as refusing to continue working at Wollersheim's business or to purchase his services or products. Instead the campaign featured a concerted practice of refusing to honor legal obligations Scientologists owed Wollersheim for services and products they already had purchased.

If the Biblical commandment to render unto Caesar what is Caesar's and to render unto God what is God's has any meaning in the modern day it is here. Nothing in *Paul* v. *Watchtower Bible & Tract Soc. of New York* or any other case we have been able to locate even implies a religion is entitled to constitutional protection for a campaign deliber-

ately designed to financially ruin anyone—whether a member or non-member of that religion. Nor have we found any cases suggesting the free exercise clause can justify a refusal to honor financial obligations the state considers binding and legally enforceable. One can only imagine the utter chaos that could overtake our economy if people who owed money to others were entitled to assert a freedom of religion defense to repayment of those debts. It is not unlikely the courts would soon be flooded with debtors who claimed their religion prohibited them from paying money they owed to others.

We are not certain a deliberate campaign to financially ruin a former member or the dishonoring of debts owed that member qualify as "religious practices" of Scientology. But if they do, we have no problem concluding the state has a compelling secular interest in discouraging these practices. (See pp. 14-17, *supra*.) Accordingly, we hold the Freedom of Religion guarantees of the U.S. and California Constitutions do not immunize these practices from civil liability for any injuries they cause to "targets" such as Wollersheim.

C. *"Auditing" Is a Constitutionally Protected Religious Practice Where It Is Conducted in a Non-coercive Environment But Is Not Protected Where Conducted Under a Threat of Economic, Psychological and Political Retribution as It Was Here*

Auditing is a process of one-on-one dialogue between a Scientology "auditor" and a Scientology student. The student ordinarily is connected to a crude lie detector, a so-called "E-Meter." The auditor asks probing questions and notes the student's reactions as registered on the E-Meter.

Through the questions, answers, and E-meter readings, the auditor seeks to identify the student's "n-grams" or "engrams." These "engrams" are negative feelings, attitudes, or incidents that act as blockages preventing people from realizing their full potential and living life to the fullest. Since Scientology holds the view people actually have lived many past lives over millions of years they carry "engrams" accumulated during those past lives as well as some from

their present ones. Once the auditor identifies an "engram" the auditor and the student work to surface and eliminate it. The goal is to identify and eliminate all the student's engrams so he or she can achieve the state of "clear." Students can pass through several levels of "auditing" en route to ever higher states of "clear."

Auditing performs a similar function for Scientology as sermons and other forms of mass persuasion do for many religions. In those religions, ministers, priests or other clergy preach to the multitude in order to bring their adherents into line with the religion's principles. Scientology instead emphasizes a one-on-one approach—the "auditing" process—to accomplish the same purpose.

At the law-and-motion stage, the trial court granted summary adjudication that "auditing" is a "religious practice" of Scientology. Once again, our review of the trial court decision reveals that on the basis of the evidence before the court on that occasion, the ruling is correct. Thus for purposes of this appeal we find "auditing" qualifies as a "religious practice" just as Scientology qualifies as a "religion."

Having found for purposes of this appeal that Scientology is a religion and auditing is a religious practice, we must next ask whether the state has a "compelling interest" in awarding compensation for any harm auditing may cause which outweighs the values served by the religious expression guarantees of the constitution.

We first note we have already held there was substantial evidence to support a jury finding that what happened during the "auditing" process, along with Scientology's other conduct toward Wollersheim, caused this particular adherent serious emotional injury. We further found substantial evidence Scientology leaders were aware of Wollersheim's psychological weakness and yet continued practices during auditing sessions which caused the kinds of psychological stress that led to his mental breakdown. Thus, there is adequate proof the religious practice of auditing caused real harm in this instance to this individual and that appellants' outrageous conduct caused that harm. Furthermore, there is sufficient evidence to support a conclusion that despite their

knowledge auditing was aggravating Wollersheim's serious psychological problems appellants deliberately insisted he not seek help from professional psychotherapists. None of this, however, means auditing represents such a threat of harm to society that the state has a compelling interest in awarding compensation which overcomes the values served by the religious expression guarantees of the constitution.

To better understand why we conclude *voluntary* auditing may be entitled to immunity from liability for the emotional injuries it causes, consider some analogies. Assume Wollersheim were not a former Scientologist, but a former follower of one of the scores of Christian denominations. Further assume he sued on grounds a preacher's sermons filled him with such feelings of inferiority and guilt his manic-depressive condition was aggravated to the same degree Wollersheim contends auditing aggravated his mental illness in this case. Or assume another Wollersheim sued another church for a similar emotional injury on grounds his mental illness had been triggered by what a cleric told him about his sins during a confession—or series of confessions. It is one of the functions of many religions to "afflict the comfortable"—to deliberately generate deep psychological discomfort as a means of motivating "sinners" to stop "sinning." Whether by "hell fire and damnation" preaching, "speaking in tongues," private chastising, or a host of subtle and not so subtle techniques religion seeks to make us better people.

Many of these techniques are capable of inflicting emotional distress severe enough that it is foreseeable some with psychiatric problems will "crack" or be driven into a deep depression. But the constitution values the good religion does for the many more than the psychological injury it may inflict on the few. Thus, it cannot tolerate lawsuits which might chill religious practices—such as auditing, "hell fire and damnation" preaching, confessions, and the like—where the only harm which occurs is emotional injury to the psychologically weak.

There is an element present in the instant case, however, that reduces the religious value of the "auditing" practiced

on Wollersheim and increases its harm to the community. This is the element of coercion. Scientology, unlike most other religions or organizations claiming a religious purpose, uses various sanctions and the threat of sanctions to induce continued membership in the Church and observance of its practices. These sanctions include "fair game", "freeloader debt" and even physical restraint. There was nothing in the evidence presented at this trial suggesting new recruits and members undergoing lower-level "auditing" were subject to sanctions if they decided to leave. Nor was there evidence these recruits or "lower level" auditors would be aware any program of sanctions even existed and thus might be intimidated by it. But there was evidence others, like Wollersheim, who rose to higher levels of auditing and especially those, like Wollersheim, who became staff members—the rough equivalent of becoming a neophyte priest or minister—were aware of these sanctions and what awaited them if they chose to "defect." Thus, their continued participation in "auditing" and the other practices of Scientology was not necessarily voluntary.

Wollersheim was familiar with the whole spectrum of sanctions and indeed was the target of some during and after his affiliation with Scientology. He first learned of one of these forms of retribution, "fair game," in 1970. He also knew that, despite the Church's public rejection of the fair game practice, it continued to use fair game against targeted ex-Scientologists throughout the 1970's. Under Scientology's "fair game" policy, someone who threatened Scientology by leaving the church "may be deprived of property or injured by any means by a Scientologist . . . . [The targeted defector] may be tricked, sued or lied to or destroyed."

Wollersheim feared "fair game" would be practiced against him if he refused further auditing and left the Church of Scientology. As described in the previous section, those fears proved to be accurate. Scientology leaders indeed became very upset by his defection and retaliated against his business.

But "fair game" was not the only sanction which Scientology held over Wollersheim's head during his years as an

"upper level" auditor and occasional staff member. Scientology also used a tactic called "freeloader debt" as a means of coercing Wollersheim's continued participation in the church and obedience to its practices. "Freeloader debt" was devised by Scientology founder L. Ron Hubbard as a means of punishing members who, inter alia, chose to leave the Church or refused to disconnect from a suppressive person.

"Freeloader debt" was accumulated when a staff member received Church courses, training or auditing at a reduced rate. The Church maintained separate records which listed the discounts allowed. If the member later chose to leave, he or she was presented with a bill for the difference between the full price normally charged to the public and the price originally charged to the member.[2] A person who stayed in the Church for five years could easily accumulate a "freeloader debt" of between $10,000 and $50,000. Wollersheim was familiar with the "freeloader debt" policy as well as the "fair game" policy. He also knew the Church was recording the courses and auditing sessions he was receiving at the discounted rate. The threat of facing that amount of debt represented a powerful economic sanction acting to coerce continued participation in auditing as the core religious practice of the Church of Scientology.

There also was evidence Wollersheim accepted some of his auditing under threat of *physical* coercion. In 1974, despite his repeated objections, Wollersheim was induced to participate in auditing aboard a ship Scientology maintained as part of its Rehabilitation Project Force. The Church obtained Wollersheim's attendance by using a technique dubbed "bait and badger." As the name suggests, this tactic deployed any number of Church members against a recalcitrant member who was resisting a Church order. They would alternately promise the "bait" of some reward and "badger" him with

---

2 During the 1970's a staff member was paid approximately $17 per week for an expected 50 hours of work. In 1973, Wollersheim earned between $10 to $18 per week when he worked at the Celebrity Center as a staff member. This salary was augmented by an occasional $10 bonus.

verbal scare tactics. In the instant case, five Scientologists "baited and badgered" Wollersheim continuously for three weeks before he finally gave in and agreed to attend the Rehabilitation Project Force.

But these verbal threats and psychological pressure tactics were only the beginning of Wollersheim's ordeal. While on the ship, Wollersheim was forced to undergo a strenuous regime which began around 6:00 A.M. and continued until 1:00 the next morning. The regime included mornings of menial and repetitive cleaning of the ship followed by an afternoon of study or co-auditing. The evenings were spent working and attending meetings or conferences. Wollersheim and others were forced to sleep in the ship's hole. A total of thirty people were stacked nine high in this hole without proper ventilation. During his six weeks under these conditions, Wollersheim lost 15 pounds.

Ultimately, Wollersheim felt he could bear the regime no longer. He attempted to escape from the ship because as he testified later: "I was dying and losing my mind." But his escape effort was discovered. Several Scientology members seized Wollersheim and held him captive. They released him only when he agreed to remain and continue with the auditing and other "religious practices" taking place on the vessel.

One of the psychiatric witnesses testified that in her opinion Wollersheim's experience on the ship was one of five cataclysmic events underlying her diagnosis of his mental illness and its cause. As the psychiatrist reported, following this incident, Wollersheim felt the Church "broke him." In any event, this episode demonstrated the Church was willing to physically coerce Wollersheim into continuing with his auditing. Moreover they were willing to do so even when it was apparent this practice was causing him serious mental distress and he preferred to cease or at least suspend this particular religious practice. Not only was the particular series of auditing sessions on the ship conducted under threat of physical compulsion, but the demonstrated willingness to use physical coercion infected later auditing sessions. The fact the Church was willing to use physical coercion on this occasion to compel Wollersheim's continued participation in auditing added

yet another element to the coercive environment under which he took part in the auditing process.

There was substantial evidence here from which the jury could have concluded Wollersheim was subjecting himself to auditing because of the coercive environment with which Scientology had surrounded him. To leave the church or to cease auditing he had to run the risk he would become a target of "fair game", face an enormous burden of "freeloader debt", and even confront physical restraint. A religious practice which takes place in the context of this level of coercion has less religious value than one the recipient engages in voluntarily. Even more significantly, it poses a greater threat to society to have coerced religious practices inflicted on its citizens.

There are important analogies to *Molko* v. *Holy Spirit Assn.*, *supra*, 46 Cal.3d 1092. In *Molko* the California Supreme Court held a religious organization could be held civilly liable for using deception and fraud to *seduce* new recruits *into the church.*[3] In that case the church concealed from new recruits the fact they were enlisting in the Unification Church. The plaintiffs argued the Unification Church psychologically and physically coerced them into accepting the Church and, therefore, they were unable to refuse formally joining once the Church's true identity was revealed. (*Id.* at pp. 1108-1109.) The Supreme Court agreed and further concluded there was no constitutional infirmity to bar the action.

"We conclude, . . . that although liability for deceptive recruitment practices imposes a marginal burden on the Church's free exercise of religion, the burden is justified by the compelling state interest in protecting individuals and families from the substantial threat to public safety, peace

---

3 In *Molko*, two plaintiffs brought actions against the Unification Church for, inter alia, fraud and intentional infliction of emotional distress based upon the Unification Church's initial misrepresentations concerning its religious affiliation. The Supreme Court held the First Amendment did not bar the plaintiffs' claims to the extent they were based upon actual coercive conduct by the Unification Church as opposed to merely the threat of divine retribution should the plaintiffs leave.

and order posed by the fraudulent induction of unconsenting individuals into an atmosphere of coercive persuasion." (*Id.* at p. 1118.)

Here Scientology used *coercion*—"fair game," "freeloader debt," and in this instance, at least, physical restraint, along with the threat one or more of these sanctions will be deployed—to prevent its members from *leaving* the Church. This coercion is similar to the coercion found in *Molko* and far different from the threats of *divine* retribution our Supreme Court held was non-actionable. (*Id.* at pp. 1120, 1122 ["To the extent the claims are based merely on threats of divine retribution if [the plaintiffs] left the church, they cannot stand].) Instead, Scientology promised—and in this case delivered—retribution in the here and now.

In *O'Moore* v. *Driscoll* (1933) 135 Cal.App. 770 cited with approval by the California Supreme Court in *Molko* v. *Holy Spirit Assn.*, *supra*, 46 Cal.3d 1092, 1114, a Catholic priest sued a Catholic organization and an ordained priest for false imprisonment when the plaintiff was restrained in an asylum run by the Catholic Church to compel his confession to criminal acts. The practice of confessing one's sins is an established religious practice of the Catholic church. But that did not immunize the defendants from liability for harm the plaintiff suffered where the religious practice was imposed on him in a coercive environment. (*Id.* at p. 774.)

In the instant case except for the experience on the ship the coercion was more subtle than physical restraint. Yet the threat of "fair game" and "freeloader debt" and even the possibility of future physical restraint loomed over Wollersheim whenever he contemplated leaving Scientology and terminating auditing or the other practices of that religion.

It is not only the acts of coercion themselves—the sabotage of Wollersheim's business and the episode of captivity on the ship—which are actionable. These acts of coercion and the threat of like acts make the Church's other harmful conduct actionable as well. No longer is Wollersheim's continued participation in auditing (or for that matter, his compliance with the "disconnect" order) merely his *voluntary* participation in Scientology's religious practices. The evidence establishes

Wollersheim was coerced into remaining a member of Scientology and continuing with the auditing process. Constitutional guarantees of religious freedom do not shield such conduct from civil liability. We hold the state has a compelling interest in allowing its citizens to recover for serious emotional injuries they suffer through religious practices they are coerced into accepting. Such conduct is too outrageous to be protected under the constitution and too unworthy to be privileged under the law of torts.

We further conclude this compelling interest outweighs any burden such liability would impose on the practice of auditing. We concede as the California Supreme Court did in *Molko* that allowing tort liability for this conduct imposes some burden on appellants' free exercise of this religion.[4] Despite the possibility of liability Scientologists can still *believe* it serves a religious purpose to impose and threaten to impose various sanctions on staff members or upper level auditors who might leave the church or cease its core religious practices. But it does place a burden on Scientologists should they act on that belief. Scientology would be subject to possible monetary loss if someone suffers severe psychological harm during auditing where that auditing is conducted under the threat of these sanctions. Likewise, Scientology may lose some staff members and upper level auditors who would not continue in the Church or continue to submit to the core practice of auditing except for their fears of retribution.

Like the Supreme Court in *Molko*, however, we find these burdens "while real, are not substantial" and, moreover, are the minimum required to achieve the state interest. To borrow from the high court's language in *Molko*: "Being subject

---

4 "While such liability does not impair the Church's right to believe in recruiting through deception, its very purpose is to discourage the Church from putting such belief into practice by subjecting the church to possible monetary loss for doing so. Further, liability presumably impairs the Church's ability to convert nonbelievers, because some potential members who would have been recruited by deception will choose not to associate with the Church when they are told its true identity." (*Molko* v. *Holy Spirit Assn.*, *supra*, 46 Cal. 3d 1092, 1117.)

to liability [for coerced auditing] does not in any way or degree prevent or inhibit [Scientologists] from operating their religious communities, worshipping as they see fit, freely associating with one another, selling or distributing literature, proselytizing on the street, soliciting funds, or generally spreading [L. Ron Hubbard's] message among the population. It certainly does not, . . . compel [Scientologists] to perform acts 'at odds with fundamental tenets of their religious beliefs.' [Citation omitted.]" (*Molko* v. *Holy Spirit Assn.*, *supra*, 46 Cal.3d 1092, 1117.)

Most significantly, by imposing liability in the instant case we "in no way or degree prevent or inhibit" Scientology from continuing the free exercise of the religious practice of auditing. Returning to the words of the Supreme Court: "At most, it potentially closes one questionable avenue for" coercing certain members to remain in the church and to continue its core practices such as auditing." (46 Cal.3d at p. 1117.)

D. *The "Disconnect" Policy Is Not a Constitutionally Protected Religious Practice in the Circumstances of This Case*

Substantial evidence supports the conclusion Scientology encouraged Wollersheim to "disconnect" from family members, including his wife and parents. Furthermore, substantial evidence supports the conclusion Scientology has a general policy of encouraging members to "disconnect" from non-Scientologists who oppose Scientology or express reservations about its teachings.

The first question is whether the "disconnect" policy qualifies as a "religious practice" of Scientology. The trial court did not grant summary adjudication on this factual issue. Nonetheless, we find the evidence supported the conclusion disconnect is a "religious practice." "Disconnect" is similar in purpose and effect to the "shunning" practiced by Jehovah's Witnesses and Mennonites, among others. It also shares some attributes with the remote monasteries common to many other religions. All of these practices serve to isolate

members from those, including family members, who might weaken their adherence to the religion. Courts have held these policies qualify as "religious practices" of other religions. (See, e.g., *Paul* v. *Watchtower Bible & Tract Soc. of New York*, *supra*, 819 F.2d 875, 879-880; *Rasmussen* v. *Bennet* (Mont. 1987) 741 P.2d 755 [Church statements condemning plaintiffs' conduct and calling for shunning were privileged under the First Amendment].) We see no justification for treating Scientology's "disconnect" policy differently and thus hold it is a "religious practice".

We recognize the "shunning" cases have involved claims brought by former church members *whom other family members were ordered to shun*. The instant case, in contrast, involves a cause of action brought by a former church member *ordered to shun the rest of his family* not the other way around. In the circumstances of this case this is a distinction without a difference. Here appellants caused Wollersheim to isolate himself from his parents, wife and other family members even though appellants had reason to know it would inflict serious emotional injury on him. The injury to him and to the family was just as severe as if his family had "shunned" him.

We need not and do not reach the question whether the practice of "disconnect" is constitutionally protected religious activity in ordinary circumstances. (Contrast *Paul* v. *Watchtower Bible & Tract Soc. of New York*, *supra*, 819 F.2d 875 [religion cannot be held civilly liable to shunned former member because "shunning" is constitutionally protected] with *Bear* v. *Reformed Mennonite Church*, *supra*, 341 A.2d 105 [religion may be civilly liable to shunned former member because "shunning" must yield to compelling state interest in promoting family relations].) Whether or not the "disconnect" policy is constitutionally protected when practiced in a voluntary context it is not so protected if practiced in the coercive environment appellants imposed on Wollersheim. The reasons are the same as apply to "auditing." (See pp. 30-39, *supra*.) Substantial evidence supports the finding Scientology created this coercive environment and Wollersheim continued to submit to the practices of the

church such as "disconnect" because of that coercion. Furthermore, the evidence in the instant case is sufficient to support a factual finding appellants imposed the "disconnect" policy on Wollersheim with the knowledge he was psychologically susceptible and therefore would suffer severe emotional injury as a result. Accordingly, in the circumstances of this case, the free exercise clause did not immunize appellants from liability for the "disconnect" policy practiced on respondent.

E. *Scientology's Improper Disclosure of Information Wollersheim Gave During Confidential Religious Expressions Is Not Religious Expression Immunized From Liability by the Constitution*

There is substantial evidence Wollersheim divulged private information during auditing sessions under an explicit or implicit promise the information would remain confidential. Moreover, there is substantial evidence Scientology leaders and employees shared this confidential information and used it to plan and implement a "fair game" campaign against Wollersheim. Scientology argues there also is substantial evidence in the record supporting its defense that Scientology leaders and employees shared this confidential information only in accordance with normal procedures and for the purpose of gaining the advice and assistance of more experienced Scientologists in evaluating Wollersheim's auditing sessions. However, the jury was entitled to disregard this innocent explanation and to believe Wollersheim's version of how and why Scientology divulged information he had supplied in confidence.

The intentional and improper disclosure of information obtained during auditing sessions for non-religious purposes can hardly qualify as "religious expression." To clarify the point, we turn once again to a hypothetical situation which presents a rough analogy under a traditional religion. Imagine a stockbroker had confessed to a cleric in a confessional that he had engaged in "insider trading." Sometime later this same stockbroker leaves the church and begins criticizing it

and its leadership publicly. To discredit this critic, the church discloses the stockbroker has confessed he is an insider trader. This disclosure might be said to advance the interests of the cleric's religion in the sense it would tend to discourage former members from criticizing the church. But to characterize this violation of religious confidentiality as "religious expression" would distort the meaning of the English language as well as the United States Constitution. This same conclusion applies to Scientology's disclosures of Wollersheim's confidences in the instant case. And, since these disclosures do not qualify as "religious expression" they do not qualify for protection under the freedom of religion guarantees of the constitution. (See Discussion at pp. 18-19, *supra*.)

## III. THE CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL INJURY MUST BE REVERSED

For reasons set forth in section II, we have concluded Scientology is not constitutionally immunized from civil liability for its cumulative course of conduct to intentionally inflict emotional injury on Wollersheim. However, this course of conduct does not supply a suitable predicate for a cause of action based on *negligent* infliction of emotional injury. These actions are potentially actionable only when they are driven by an animus which can properly qualify them as "outrageous conduct." That is, they must be done for the purpose of emotionally injuring the plaintiff, or at the least with reckless disregard about their adverse impact on plaintiff's mental health. (*Nally* v. *Grace Community Church*, *supra*, 47 Cal.3d 278, 300; *Miller* v. *National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1487.)

We have held in the prior section that Scientology and its leaders indeed engaged in these actions with an intent to emotionally injure Wollersheim. But this intentional activity was alleged in the intentional infliction of emotional injury count and was tried under that count. The negligence count, on the other hand, of necessity alleges a lesser degree of culpability

and can be sustained only if the defendant could be liable even if the emotional injuries were caused by completely unintentional, merely negligent acts or omissions. (See *Slaughter* v. *Legal Process Courier Service* (1984) 162 Cal.App.3d 1236, 1249; 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 838, p. 195.)

In this context, Scientology is responsible only if it or any other religion could be held liable where through inadvertence something it or its leaders did damaged someone's business and thereby caused the businessman emotional injury. Or if it or any other religion could be held liable where it inadvertently revealed some information a member had disclosed in confidence as part of a religious practice like auditing or a confession. Or if it or another religion could be held liable where its functionaries inadvertently said something during auditing or a sermon or a confession which triggered a listener's nascent mental illness.

At bottom, this question of duty is a matter of weighing competing public policy considerations. (*Dillon* v. *Legg* (1968) 68 Cal.2d 728, 734; *Ballard* v. *Uribe* (1986) 41 Cal.3d 564, 572, fn. 6.)[5] On balance, the religious freedom consideration outweighs any concern about spreading the cost of emotional injury, reducing the frequency of such emotional injuries, and the like. It is one thing to say we will impose liability when a religious organization intentionally or recklessly sets out to ruin a business or to reveal confidential information or to "audit" mercilessly or to "disconnect" a psychologically weak person from his family and thereby succeeds in emotionally injuring a member or former member of that religion. It is quite another to impose liability for negligent acts which inadvertently cause the same types of injuries. (See *Coon* v. *Joseph* (1987) 192 Cal.App.3d 1269, 1273.)

Since we hold religious organizations owe no duty to members or former members with respect to these forms of

---

5 " '[D]uty' is not an immutable fact of nature ' "but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." ' [Citation.]" (*Ballard* v. *Uribe*, *supra*, 41 Cal.3d at p. 572, fn. 6.)

injury, the cause of action for negligent infliction of emotional injury must be reversed. We need not, however, reverse the entire judgment. Here, the jury found the Church liable for both negligent and intentional infliction of emotional distress. As we discussed above, there is substantial evidence to support a finding on the intentional infliction theory. We may fairly presume any damages awarded on the negligence theory are subsumed in the award for intentional infliction of emotional distress. Accordingly, any error in allowing the jury to consider the negligence theory does not affect the judgment. (See *Vahey* v. *Sacia* (1981) 126 Cal.App.3d 171, 179-180; *Bacciolieri* v. *Charles C. Meek Milling Co.* (1959) 176 Cal.App.2d 822, 826.)

## IV. THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTIONS TO DISMISS FOR FAILURE TO FILE BEFORE THE STATUTE OF LIMITATIONS HAD EXPIRED ON WOLLERSHEIM'S CAUSES OF ACTION

Scientology argues on appeal, as it did at virtually every opportunity below, that Wollersheim's causes of action are barred by the statute of limitations. At each and every juncture the various trial judges who heard these arguments rejected them. These judges ruled correctly that Wollersheim's causes of action were subject to the discovery rule. (3 Witkin, Cal. Procedure (3d ed. 1985) Actions, § 356, p. 383.) The issue in each instance, thus, was *when* Wollersheim discovered, or should have discovered, all of the elements of his cause of action against Scientology. (*See Leaf* v. *City of San Mateo* (1980) 104 Cal.App.3d 398, 407-408.) The trial judges properly ruled this issue, in turn, was a jury question. (*Id.* at p. 409.)

On appeal, this court is bound to uphold the jury's resolution of these factual questions unless we determine the findings are not supported by substantial evidence. After a careful review of the evidence, we conclude these findings about the timeliness of Wollersheim's filing of this case are supported by substantial evidence. Consequently, we affirm

the rulings by the judges below and, furthermore, we likewise affirm the factual findings the jury impliedly made that Wollersheim did not discover and should not have discovered his causes of action until a time within the statutory period.

## V. THE TRIAL COURT DID NOT COMMIT INSTRUCTIONAL ERROR OR EVIDENTIARY ERROR DURING THIS FIVE-MONTH TRIAL WHICH DENIED APPELLANTS A FAIR TRIAL OR DUE PROCESS OF LAW

Appellants' final contention is that they were denied a fair trial and due process of law because of various instructional and evidentiary rulings the court made during this five-month trial. Considering the length of the trial it is surprising appellants were able to identify so few questionable rulings.

Appellants first complain the trial court erroneously denied two instructions they requested. The first of these instructions restated the elements of the cause of action for intentional infliction of emotional distress or outrageous conduct with a slant favoring appellants' position.[6]

As requested the instruction implied the jury was to disregard evidence of appellants' acts which did not fit precisely

---

6 The requested instruction reads:

"Plaintiff's claim for intentional infliction of emotional distress, or outrageous conduct, is divided into several parts. [¶] First, plaintiff's claim that defendant engaged in outrageous conduct by subjecting plaintiff to its practice of auditing—which, as I shall instruct you, is the central religious practice of the religion of Scientology. [¶] Second, plaintiff claims that defendant caused plaintiff to separate from his family and friends as a condition for remaining in Scientology. [¶] Third, plaintiff claims that defendant 'attacked plaintiff's business' and induced those of his employees who were Scientologists to leave his employ. [¶] Fourth, plaintiff claims that defendant disclosed his auditing files in disregard of alleged promises of confidentiality to persons not authorized to receive them. [¶] All of these acts were allegedly undertaken to inflict severe emotional distress upon the plaintiff. [¶] The plaintiff is restricted in this case to the claims he set forth in his complaint. Evidence of any purported acts of the defendant not relating to the four categories I have just described to you may not be considered in determining whether plaintiff has established that defendant committed the tort of intentional infliction of emotional distress [App. A306-07]."

under the courses of conduct as they defined them. Actually the plaintiffs' causes of action were broader in many respects than the descriptions the appellants requested. Moreover, some of the evidence introduced at the trial related to acts relevant to issues of appellants' state of mind (intent, motivation, and the like) and whether respondent was voluntarily participating in Scientology's practices or was doing so within a coercive environment. Accordingly, the instruction as requested would have been misleading to the jury. The trial court gave an instruction which set forth the elements of the cause of action. Any amplification of that instruction should have been more accurate than the one appellants requested and less misleading as to the full scope of the jury's range of inquiry. Thus it was not error to refuse to give this instruction.

Appellants also complain about the refusal of one of their requested instructions ordering the jury in very specific fashion to disregard evidence presented which was relevant to the non-suited fraud counts. Again, the requested instruction was stated in overbroad terms and unduly slanted in appellants' direction. For instance, as requested, it instructed the jury that "it must disregard evidence presented in this trial regarding statements purportedly made to [the plaintiff] to induce his participation in defendant church." If given, this instruction could have misled the jury into believing it must disregard evidence which provided context for the intentional infliction count or which went to the presence or absence of coercion and appellants' state of mind. So once again it was not error to refuse these instructions. (See *Wank* v. *Richman & Garrett* (1985) 165 Cal.App.3d 1103, 1113; *Lubek* v. *Lopes* (1967) 254 Cal.App.2d 63, 73.)

In any event, on reviewing the total evidence offered in this trial, we find that even if it were error to refuse these instructions that error was not prejudicial. (*Henderson* v. *Harnischfeger* (1974) 12 Cal.3d 663, 670; *Williams* v. *Carl Karcher Enterprises, Inc.* (1986) 182 Cal.App.3d 479, 489; see 9 Witkin, Cal. Procedure, *supra*, Appeal, § 352, pp. 355-356.) We cannot say that the giving of these instructions would

have substantially enhanced the chances appellants would have prevailed.

Appellants likewise complain about evidentiary rulings. Although they mention only a handful of specific incidents, they accuse the judge of admitting a mass of prejudicial evidence about actions Scientology took toward third persons. In their brief appellants concede this evidence was admissible under Evidence Code section 1101(b) as proof of "intent" and "malice."[7] But they ask us to reverse the trial court under Evidence Code section 352 on grounds the relevance of this evidence was overwhelmed by its prejudicial effect.[8]

In reviewing the trial court's exercise of its discretion under section 352, appellate courts traditionally give great deference to the trial court's evaluation of relevance versus prejudice. (See *People* v. *Mota* (1981) 115 Cal.App.3d 227, 234; 1 Johnson, Cal. Trial Guide (1988) § 22.40, p. 22-43.) In the instant case we do not find an abuse of discretion. Much of the evidence appellants object to was highly relevant to show the network of sanctions and coercive influences with which Scientology had surrounded Wollersheim. Much of the rest was highly relevant to show Wollersheim's state of mind while undergoing audit, disconnect and the like or appellants' state of mind, that is, their intent, malice, motives, and the like. Whatever prejudice to appellants may have accompanied introduction of this evidence it does not "substantially outweigh" the probative value of the evidence to important issues in this case.

---

7 "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act." (Evid. Code, § 1101, sub. (b).

8 "The court in its discretion may exclude evidence if its probative value *is substantially outweighed* by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352, italics added.)

Finally, appellants complain about the alleged prejudicial conduct of Wollersheim's counsel during the trial and closing argument. As was true of their claims of instructional and evidentiary evidence, appellants provide us with only a few examples of alleged prejudicial error and imply these are but the tip of the iceberg. They confine themselves to this handful of incidents either because no other potentially prejudicial incidents occurred or because they expect this court to do their job by scouring the 25,000 page record for other examples to bolster their claim of error. If what appellants set forth in their brief represent the only incidents they allege as prejudicial conduct, we find them insufficient to justify reversal under applicable standards of prejudice. (*Garden Grove School Dist.* v. *Hendler* (1965) 63 Cal.2d 141, 144 [attorney misconduct only requires reversal if "it is reasonable to conclude that a verdict more favorable to defendants would have been reached but for the error"]; see 9 Witkin, Cal. Procedure, *supra*, § 340, p. 346.) And if these brief examples were only an invitation to do appellants' work in identifying prejudicial error in their opposing attorney's conduct, we decline that invitation. (*Horowitz* v. *Noble* (1978) 79 Cal.App.3d 120, 139 [" 'The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment' "]; *Wint* v. *Fidelity & Casualty Co.* (1973) 9 Cal.3d 257, 265.)

## VI. THE GENERAL DAMAGES AND PUNITIVE DAMAGES THE JURY AWARDED ARE EXCESSIVE FOR THE INTENTIONAL INFLICTION OF EMOTIONAL INJURY COUNT AND THUS THOSE DAMAGE AWARDS MUST BE REDUCED

In the previous section, we concluded the allegations which are supported by substantial evidence are enough to sustain a cause of action for intentional infliction of emotional injury against Scientology. But that conclusion does not determine whether the proved allegations support the level of damages the jury awarded under this cause of action. We turn to that issue now.

We are only concerned now with whether a reasonable juror could have found this level of "outrageous" conduct inflicted $5 million worth of emotional injury on Wollersheim. Similarly, we ask whether this level of "outrageous" conduct and Scientology's degree of intent in carrying it out warrant $25 million in punitive damages. We conclude these awards are excessive for the conduct alleged and proved in this case.

An award for compensatory damages will be reversed or reduced "upon a showing that it is so grossly disproportionate to any reasonable view of the evidence as to raise a strong presumption that it is based upon prejudice or passion." (*Koyer* v. *McComber* (1938) 12 Cal.2d 175, 182; accord *Schroeder* v. *Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919 ["an appellate court may reverse an award only ' "When the award as a matter of law appears excessive, or where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice' " [Citations]"]; *Fagerquist* v. *Western Sun Aviation, Inc.* (1987) 191 Cal.App.3d 709, 727; see 8 Witkin, Cal. Procedure, *supra*, Attack on Judgment in Trial Court, § 46, p. 446.) Even under this stringent standard, it is manifest the jury's award here is excessive since it is so grossly disproportionate to the evidence concerning Wollersheim's damages.

Wollersheim's psychological injury although permanent and severe is not totally disabling. Moreover, even Wollersheim admits Scientology's conduct only aggravated a preexisting psychological condition; Scientology did not create the condition. While the jury awarded Wollersheim $5 million in compensatory damages, we determine the evidence only justifies an award of $500,000.

"It is well established that a reviewing court should examine punitive damages and, where appropriate, modify the amount in order to do justice." (*Gerard* v. *Ross* (1988) 204 Cal.App.3d 968, 980; *Allard* v. *Church of Scientology*, *supra*, 58 Cal.App.3d at p. 453.) In reviewing a punitive damages award, the appellate court applies a standard similar to that used in reviewing compensatory damages, i.e., whether, after reviewing the entire record in the light most

favorable to the judgment, the award was the result of passion or prejudice. (See *Bertero* v. *National General Corp.* (1974) 13 Cal.3d 43, 64; *Devlin* v. *Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 388.) However, the test here is somewhat more refined, employing three factors to evaluate the propriety of the award.

The first factor is the degree of reprehensibility of the defendant's conduct. (*Neal* v. *Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.) "[C]learly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal." (*Ibid.*)

The second factor is the relationship between the amount of the award and the actual harm suffered. (*Ibid.*; *Seeley* v. *Seymour* (1987) 190 Cal.App.3d 844, 867.) This analysis focuses upon the ratio of compensatory damages to punitive damages; the greater the disparity between the two awards, the more likely the punitive damages award is suspect. (*Seeley* v. *Seymour*, *supra*, 190 Cal.App.3d at p. 867; see *Little* v. *Stuyvesant Life Ins. Co.* (1977) 67 Cal.App.3d 451, 469-470.)

Finally, a reviewing court will consider the relationship of the punitive damages to the defendant's net worth. (*Neal* v. *Farmers Ins. Exchange*, *supra*, 21 Cal.3d at p. 928; *Devlin* v. *Kearny Mesa AMC/Jeep/Renault, Inc.*, *supra*, 155 Cal. App.3d at p. 390.) In applying this factor courts must strike a proper balance between inadequate and excessive punitive damage awards. "While the function of punitive damages will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort, the function also will not be served by an award which is larger than necessary to properly punish and deter." (*Devlin* v. *Kearney Mesa AMC/Jeep/Renault, Inc.*, *supra*, 155 Cal.App.3d at p. 391.)

As to the punitive damage award, we find it is not commensurate with Scientology's conduct *in this case*. This is not a situation where the centerpiece of the case involved a Church-ordered physical beating or theft or criminal fraud against Wollersheim. The "outrageous conduct" was less outrageous and more subtle than that. We further note Wol-

lersheim's counsel in the full flood of his emotional summation at the conclusion of this lengthy trial only deigned to urge the jury to return punitive damages of *as much as* "six or seven million dollars."

The evidence admitted at trial supported the finding the appellant church had a net worth of $16 million at the time of trial. Accepting these figures as true, the jury awarded Wollersheim *150 percent of* appellant's net worth in punitive damages alone—195 percent if compensatory damages are included. This appears not just excessive but preposterous. (*Seeley* v. *Seymour*, *supra*, 190 Cal.App.3d at p. 869 [punitive damages reversed; award was 200 percent of defendant's net worth]; *Burnett* v. *National Enquirer, Inc.* (1983) 144 Cal.App.3d 991, 1012 [punitive damages reduced; initial award was 35 percent of defendant's net worth]; *Egan* v. *Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 824 [punitive damages reversed; award was 58 percent of defendant's net income]; *Allard* v. *Church of Scientology*, *supra*, 58 Cal.App.3d at pp. 445-446, 453 [punitive damages reversed; award was 40 percent of defendant's net worth]; compare *Devlin* v. *Kearney AMC/Jeep/Renault, Inc.*, *supra*, 155 Cal.App.3d at pp. 391-392 [punitive damages affirmed where award was 17.5 percent of defendant's net worth]; *Schomer* v. *Smidt* (1980) 113 Cal.App.3d 828, 836-837 [punitive damages affirmed; award was 10 percent of defendant's net worth]; *Downey Savings & Loan Assn.* v. *Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1100 [punitive damages affirmed; award was 7.2 percent of defendant's net income].) We find it especially excessive given the nature of the "outrageous conduct" in this particular case. Accordingly we reduce the punitive damage award to $2 million.

## DISPOSITION

The judgment is reversed as to the cause of action for negligent infliction of emotional injury. The judgment as to the cause of action for intentional infliction of emotional injury is modified to reduce the compensatory damages to $500,000

and the punitive damages to $2 million. In all other respects the judgment is affirmed. Each party to bear its own costs on appeal.

CERTIFIED FOR PUBLICATION

JOHNSON, J.

We concur:

LILLIE, P.J.

WOODS (Fred), J.

## APPENDIX D

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

C332 027
Dept. 117N
Honorable Ronald Swearinger

---

LARRY WOLLERSHEIM

vs.

CHURCH OF SCIENTOLOGY

---

Dated: September 18, 1986

---

Counsel for Plaintiff: CHARLES O'REILLY

Counsel for Defendant: GEORGE ROSENBERG
EARLE COOLEY
JOHN PETERSON

---

NOTICE OF RULING

DEFENDANT'S MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT

*Denied*

and

DEFENDANT'S MOTION FOR NEW TRIAL

*Denied*

A copy of this minute order is sent via U.S. Mail this date to:

EARLE C. COOLEY
COOLEY, MANION, MOORE & JONES
530 Atlantic Avenue
Boston, MA 02210

JOHN G. PETERSON
PETERSON & BRYAN
8530 Wilshire Blvd. Ste. 407
Beverly Hills, CA 90211

CHARLES O'REILLY
GREENE, O'REILLY, et al.
816 S. Figueroa Street
Los Angeles, CA 90017

MINUTE ORDER

## APPENDIX E

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

C332 027

Dept. 50

Honorable Alfred L. Margolis

---

LARRY WOLLERSHEIM

vs.

CHURCH OF SCIENTOLOGY OF CALIFORNIA

---

Dated: October 21, 1985

Counsel for Plaintiff:
GREENE, O'REILLY, BROILLET, ETC.
BY: CHARLES O'REILLY
STEVE WILSON
LETA ST. CLAIR SCHLOSSER

Counsel for Defendant:
OVERLAND, BERKE, WESLEY, GITS, ETC.
BY: R. BURKE
KAREN MCCABE
PAUL MOORE
EARL COOLEY

JURY TRIAL

Matter comes regularly on calendar this date for hearing having been continued from October 17, 1985, with all counsel present as here-to-fore.

The clerk filed three telegrams, twenty-three mail grams, two special deliveries, one intelpost, and one letter that were received on October 18, 1985, between the hours: 10:15 a.m., and 11:25 a.m.

At approximately 8:50 a.m., the clerk filed defendant's request for protective order; defendant's motion to exclude exhibits from record; and, defendant's reply to plaintiff's memorandum of law.

At approximately 9:00 a.m., the clerk filed one telegram, five letters, one cable, thirty-three mail grams, and telephonically received one cable and one telegram.

In open court, the court orders that there are to be no recording devices in the court room; and, that no further motions are to be filed by either side, except by written request and leave of the court first obtained.

As to defendant's motion in limine relative to triable issues, the court *grants* defendant's motion as to items No. 1, No. 2, and No. 3; all other issues are DENIED.

As to defendant's motion to quash plaintiff's motion to appear, as to L. Ron Hubbard, the motion is deferred for ruling with defendant to file further points and authorities at 9:15 o'clock on October 22, 1985.

Defendant's motion to sequester the jury is DENIED.

Defendant's motion for separate trials as to the issues of liability and damages is DENIED.

Motion of plaintiff to produce certain documents at trial is granted as to the plaintiff, his mother, his father, his sister, the law firm of GREENE, O'REILLY, BROILLET, ETC., and Associates, attorney, Lita Schlosser, Charles O'Reilly and documents are to be delivered by October 28, 1985.

The court orders that service in this case is to be made, one on the other, between the hours of 9:00 a.m., and 5:00 p.m.,

on Monday through Friday, excluding holidays, except by explicit agreement.

At approximately 10:30 a.m., matter is recessed and counsel are instructed to file all additional and supplemental documents at 9:15 a.m., on October 22, 1985, in Department and that the court will render all further rulings on motions in limine at 1:30 p.m.

At approximately 1:30 p.m., the clerk filed one telegram, two mailgrams, three electronic letters, twelve pages of electronic messages; and one hundred fifty-seven letters which were hand-delivered, and are not postmarked.

At approximately 3:00 p.m., the clerk filed one special delivery, and one INTELPOST (U.S. Electronically transmitted first classmail).

MINUTE ORDER

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No. C 332 027

LARRY WOLLERSHEIM,

*Plaintiff,*

vs.

CHURCH OF SCIENTOLOGY OF CALIFORNIA, et al.,

*Defendants.*

MOTION IN LIMINE CONCERNING SCOPE OF TRIABLE ISSUES; FIRST AMENDMENT; PRIEST PENITENT PRIVILEGE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF ROBERT BERKE; DR. FRANK FLINN, REVEREND KENNETH HODEN; MADELINE HOOPER

Date: October 15, 1985

Time: 9:15 A.M.

Dept: 50

TO THE CLERK OF THIS COURT AND TO COUNSEL FOR THE PLAINTIFF IN THE ABOVE ENTITLED ACTION;

Defendant Church of Scientology of California hereby moves this Court to exclude certain evidence as may be offered in support of each of the respective causes of action herein on the grounds that the First Amendment to the United States Constitution prohibits inquiry by judge or jury into the nature, truth or falsity, and interpretation of the religious practices and tenets of any religion, including, in this instance, the Church of Scientology.

The Defendant Churches of Scientology hereby moves *in limine* for a pre-trial order that Plaintiff Larry Wollersheim not be allowed to introduce into evidence at trial any evi-

dence or allegations concerning constitutionally protected religious activities, beliefs, and practices of the religion of Scientology, the Church of Scientology, or of Scientologists, including the following such matters which are the subject of the four counts of the Complaint in this case:

1. The Church of Scientology's belief in, and practice of, auditing.
2. Representations alleged to have been made by any members of any Church of Scientology with respect to the benefits, nature, or efficacy of auditing.
3. Evidence of acts or history as to the alleged successes or failures of auditing.
4. Confidential counseling materials utilized by the Church of Scientology of California for providing religious counseling to parishioners.
5. Beliefs, practices and policies relating to the methods by which Scientology is taught, preached or proselytized.
6. Confidential communications occurring in a religious setting between ministers of the Church and Plaintiff Wollersheim or any other present or former member of the Church.
7. Donations, expenditures of funds, or services given by the plaintiffs or others, to the Church of Scientology, as offerings or in exchange for services, training, books, courses, and auditing.
8. The relationship between Church and parishioners, including but not limited to the manner in which a parishioner's private and confidential information is handled within the Church.
9. The alleged Church doctrines of "disconnect" and "fair game" or any doctrine regulating the relationships between Scientologists and non-Scientologists or between Scientologists and former Scientologists.
10. Evidence of or relating to the internal structure of the Church or the Church's Justice and Ethics Sys-

tem or financial affairs of the Churches of Scientology or of the Scientology movement.

11. Evidence of the methods by which the Church of Scientology maintains discipline, purity of faith, and loyalty among its adherents.
12. Evidence of the relationship between the Church of Scientology and its adherents.

This Motion is based upon the pleadings and files in this action, the attached Memorandum of Points and Authorities, and such additional evidence and argument as is presented at the hearing on the Motion.

DATED: September 25, 1985

Respectfully submitted,

OVERLAND, BERKE, WESLEY,
GITS, RANDOLPH & LEVANAS
A Professional Corporation

By _____
ROBERT BERKE
*Attorneys for Defendant Church of Scientology of California*

**Appendix F**

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 88

HON. NORMAN L. EPSTEIN, *JUDGE*

No. C332027

---

LARRY WOLLERSHEIM,

*Plaintiff*,

VS.

CHURCH OF SCIENTOLOGY OF CALIFORNIA, ET AL.,

*Defendants.*

---

REPORTER'S TRANSCRIPT OF PROCEEDINGS

FRIDAY, JUNE 14, 1985

* * * * *

[THE COURT:] So to the extent that there is a challenge to the timeliness of the motion for summary judgment, that objection is not upheld. I believe the motion is timely and the issue is properly before me.

I've read the papers and considered the matter. I am cognizant that matters are delicate when they are in a first amendment posture. And the first amendment is invoked in this litigation. So I am sure the point that will be alluded to that aspect of it does not have to be belabored. At least, for the purposes of reminding me that it is a first admendment situation. I am aware of that.

Even if it's the case that one court or another at one time or another has held that Scientology is or is not a religion, I don't think that that fact, if it is a fact, is conclusive on this

litigation. And I have some question as to whether it's even relevant to this litigation. If, as in the Founding Church case, we are dealing with a religion so long and well established that there could be no question whatsoever, then the existence of the entity as a religion is subject to judicial notice. If that's not the situation, then it can be an evidentiary matter.

The moving party describes this as a question of law. I think what it actually is is a mixed question of law and fact. There are factual matters which, if established up to a certain threshold, may require a conclusion of law that the entity is a religion.

My tentative views with respect to the summary judgment and summary adjudication of issues are these: I think I should grant number five. Scientology is a religion. I think the moving papers sufficiently establish that. I have no separate statement presented by the opposition as required by section 437c. And as to the extent that factual matters are invoked, as I believe they are, with respect to that issue, any controverting should be by a separate statement with the appropriate citations as required by the code. That's not done.

The supporting documents for the proposition that Scientology is a religion do more than make a prima facie case; they make a strong case. And I am satisfied, based on the posture of what I have, and I am referring particularly to the declaration of Mr. Flinn, that number five should be granted. My tentative view is that all the others should be denied.

* * * *

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

C332 027

Dept. 88

Honorable Norman L. Epstein

LARRY WOLLERSHEIM

vs.

CHURCH OF SCIENTOLOGY OF CALIFORNIA, et al.

Dated: June 14, 1985

Counsel for Plaintiff:
LETA ST. CLAIR SCHLOSSER
CHARLES B. O'REILLY
STEVE WILSON

Counsel for Defendant:
TAYLOR, ROTH & BUSH
ROBERT KROPP, JR.
HARRISON W. HERTZBERG
ERIC M. LIEBERMAN

MOTION OF DEFENDANT CHURCH OF SCIENTOLOGY OF CALIFORNIA FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, FOR SUMMARY ADJUDICATION OF ISSUES

1) Court rules on evidentiary objections as reflected in the reporter's notes.

2) The motion is timely.

3) Court denies summary judgment. Of the summary adjudication of issues, Court grants #5 and denies all others. Each of the others asks the Court to rule that conduct of defendant *as alleged* is not actionable. This requires that moving party negative these claims—i.e., show that the factual statements are untrue—or establish that a basis of relief is not stated even if they are factually correct. Moving party has failed to do this. No declaration is presented by anyone who claims to have been an auditor or supervisor of an auditor who treated with plaintiff. It is not proven that those who did treat with plaintiff did so out of religious conviction. If those persons acted *as alleged*, their conduct is actionable.

4) Considering the proximity of a trial date, the running of the 5-year period, and the nature of the motion (it could have been brought at almost any point in the litigation) and the absence of the statutory showing, ruling should not be deferred under 437c(h). Bifurcation should be decided by the trial court.

Counsel for responding parties are to prepare the orders and submit with approval as to form.

The Court orders the County Clerk to safeguard the file in a single place pending formal order for sequestering. Court will mail Intended Decision to counsel re sequestering for comments, prior to making formal order.

MINUTE ORDER

Supreme Court, U.S.
FILED
MAR 27 1990
JOSEPH F. SAPNIOL, JR.
CLERK

(2)

No. 89-1361

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
*Petitioner,*

vs.

LARRY WOLLERSHEIM,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

## RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM JAMES MURPHY
Counsel of Record

MURPHY & McDANIEL
118 West Mulberry Street
Baltimore, Maryland 21201
(301) 685-3810

Attorneys for Respondent
Larry Wollersheim

Dated: March 27, 1990

BEST AVAILABLE COPY

19 pp

## QUESTIONS PRESENTED

1. Whether the free exercise clause of the First Amendment prohibits courts from imposing tort liability on the Church of Scientology for the intentional infliction of emotional distress based on evidence of its coercive behavior toward respondent, and launching a campaign of personal and financial retribution against respondent when he left the group.

2. Whether the jury in this case was adequately instructed not to impose tort liability on the Church of Scientology based on its religious beliefs or conduct protected by the free exercise clause of the First Amendment.

3. Whether the Court of Appeal's opinion reflects that it adequately reviewed the 25,000 page trial court record.

4. Whether the free exercise clause of the First Amendment prohibits a properly-instructed jury from awarding punitive damages against the Church of Scientology for engaging in a pattern of coercive behavior against respondent, over the course of many years, which conduct exacerbated respondent's previously dormant asymptomatic predisposition to a bipolar manic-depression disorder and brought him to the brink of suicide, and which conduct was engaged in with a reckless disregard for respondent's mental condition and emotional instability, and which included a campaign of personal and financial retribution against respondent designed to punish him for leaving the group.

5. Whether the Court of Appeal's reduction of the jury's award of punitive damages in this case from $25 million to $2.0 million demonstrates that the reviewing court imposed strict limits on the jury's discretion to award punitive damages in this case, and fully afforded petitioner any rights that the Due Process Clause might require.*

---

* Respondent has challenged the reduction of his damages in the courts below, and in his pending Petition for Writ of Certiorari. *See Wollersheim* v. *Church of Scientology of California*, No.89-1367, Pet. at 23-24.

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii-iv

STATEMENT OF THE CASE ..... 2

1. Introduction ..... 2
2. The Nature Of Scientology ..... 3
3. The Nature Of The Proceedings Below ..... 5
4. A Brief Summary Of The Evidence And The Manner In Which It Was Presented To The Jury ..... 6

REASONS FOR DENYING THE WRIT ..... 9

I. The Jury And The Courts Below Did Not Impose Damages Against Petitioner Based Upon Its Free Exercise Of Peaceful Religious Practices ..... 9

II. The Judgment Below Could Not Have Rested On A Jury Finding That Violated Petitioner's Free Exercise Rights ..... 10

III. The Court Of Appeal's Decision Reflects A Careful Review Of The Record ..... 10

IV. The Jury's Award Of Punitive Damages Was Not Based On Petitioner "Providing Its Central Peaceful Religious Practices To A Parishioner" ..... 11

V. Petitioner's Due Process Rights Were Not Violated By The Jury's Award Of Punitive Damages, Substantially Reduced By The Court of Appeal ..... 13

CONCLUSION ..... 14

## TABLE OF AUTHORITIES

**CASES** **Page**

*Alcolac, Inc.* v. *Elam*, No. 88-1992, *cert. denied*, ____ U.S. ____, 110 S. Ct. 69 (1989) ..... 13

*Browning-Ferris Industries, Inc.* v. *Kelco Disposal, Inc.*, ____ U.S. ____, 109 S. Ct. 2909 (1989) ..... 13-14

*Christofferson* v. *Church of Scientology of Portland*. 57 Or. App. 203, 644 P. 2d 577 (1982), *cert. denied*, 459 U.S. 1206 (1983) ..... 12

*Church of Scientology of California* v. *Commissioner of Internal Revenue*, 823 F. 2d 1310 (9th Cir. 1987), *cert. denied*, 486 U.S. ____, 108 S. Ct. 1752 (1988) ..... 4

*Church Universal & Triumphant, Inc.* v. *Witt*, No. 89-672, *cert. denied*, ____ U.S. ____, 110 S. Ct. 839 (1990) ..... 9-10

*Clardy* v. *Sanders*, No. 89-440, *cert. denied*, ____ U.S. ____, 110 S. Ct. 376 (1989) ..... 13

*Combined Insurance Co. of America* v. *Ainsworth*, No. 89-282, *cert. denied*, ____ U.S. ____, 110 S. Ct. 376 (1989) ..... 13

*Delli Paoli* v. *United States*, 352 U.S. 232 (1957) ..... 10

*Founding Church of Scientology* v. *Webster*, 802 F. 2d 1448 (D.C. Cir. 1986), *cert. denied*, 484 U.S. 871 (1987) ..... 4

*Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) ..... 11-12

*Hernandez* v. *Commissioner of Internal Revenue*, ____ U.S. ____, 109 S. Ct. 2136 (1989) ..... 4

*Stromberg* v. *California*, 283 U.S. 359 (1931) ..... 10

*Vintage Enterprises, Inc.* v. *Jaye*, No. 89-456, *cert. denied*, ____ U.S. ____, 110 S. Ct. 377 (1989) ..... 13

*Volkswagen of America, Inc.* v. *Gibbs*, No. 89-228, *cert. denied*, ____ U.S. ____, 110 S. Ct. 418 (1989) ..... 13

*Wollersheim* v. *Church of Scientology of California*, No. 89-1367 (U.S., filed Feb. 23, 1990) ..... 4,11

**STATUTES AND RULES**

Internal Revenue Code, 26 U.S.C. § 501 (c) (3) ..... 4

Rules of the United States Supreme Court 15.1 ..... 2

24.2 ..... 2

**OTHER AUTHORITIES**

L.R. Hubbard, *Dianetics: The Modern Science Of Mental Health* (1950) ..... 4

IN THE
**Supreme Court of the United States**
OCTOBER TERM, 1989

---

NO. 89-1361

---

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
*Petitioner,*

vs.

LARRY WOLLERSHEIM,
*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

---

# RESPONDENT'S BRIEF IN OPPOSITION

---

Respondent Larry Wollersheim, the plaintiff in the proceedings below, respectfully requests that the Court deny the Church of Scientology of California's petition for a writ of certiorari to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District. That opinion is reported at 212 Cal. App. 3d 872, 260 Cal. Rptr. 331 (1989).

## STATEMENT OF THE CASE

### 1. Introduction.

In accordance with this Court's Rule 15.1, respondent respectfully submits that the Questions Presented, as framed by the petitioner, are not fairly presented by the record in this case.[1] Throughout the proceedings in this case -- at trial, on appeal, in its petition for rehearing in the Court of Appeal, in its petition for review by the California Supreme Court and now in its Petition for Writ of Certiorari-- the petitioner has sought to transform all issues in this case into the question whether a church may be subjected to tort liability for engaging in "peaceful, voluntary religious practices." The evidence presented by respondent during a lengthy four and a half month trial demonstrated that -- insofar as petitioner engaged in the practices challenged by respondent at trial -- those practices were not peaceful, they were not voluntary, and they were not genuinely religious.

Respondent, who was on the witness stand for eighteen days (ten of those days consisting of cross-examination by the petitioner's attorneys), testified that the petitioner's practice of "auditing" never was presented to him as a religious practice, but rather was introduced to him as a scientific means of self-improvement. In 1974, petitioner's members held him against his will on board a ship for six weeks where he was subjected to hard labor and relentless coerced "auditing." Pet. App. at 7a. Respondent was urged by petitioner to "disconnect" from his family because of concerns they expressed about his continued membership in the group. Ibid. When respon-

---

[1] Because respondent is dissatisfied with the Questions Presented as framed by the petitioner he has reframed those Questions on page i, in accordance with this Court's Rule 24.2, and to conform the questions to the findings of the jury and the decision of the Court of Appeal.

dent finally decided to leave Scientology, petitioner launched a successful campaign to destroy respondent's business, as part of a recognized practice of "fair game"[2] that petitioner has used in the past against former members, government officials, and other perceived enemies. Pet. App. at 8a.

The evidence of *petitioner's conduct* toward respondent, presented at trial, is fairly summarized in the Court of Appeal's opinion. *See* Pet. App. at 6a-9a. Indeed, the opinion goes so far as to state that in some circumstances, "auditing" and "disconnect" might be viewed as religious practices, Pet. App. at 23a, 32a, a characterization that respondent consistently resisted at trial and on appeal. But in the final analysis, based on its review of the lengthy record before it, the Court of Appeal concluded that the jury was correct in deciding that as petitioner conducted itself toward respondent its practices were not protected by the free exercise clause of the First Amendment because they were not practices in which respondent voluntarily engaged. *See* Pet. App. at 29a-33a. Rather, the Court of Appeal affirmed the jury's verdict on liability because the record supported respondent's claim that the practices at issue were coercive, outrageously dangerous to the respondent's mental health and well-being, and ultimately part of a deliberate campaign to ruin the respondent financially.

Petitioner presented its version of the facts to a jury. The jury rejected that version and, based on limiting instructions that fully protected petitioner's free exercise rights, found in favor of the respondent. The Court of Appeal reviewed the petitioner's arguments, and based on the factual record, rejected them. The holding below is limited to the facts of this case, and raises none of the broad questions of religious freedom that petitioner asks this Court decide.

**2. The Nature of Scientology.**

The Church of Scientology was founded in the early 1950's

---

[2]A Scientology policy letter defined "fair game" as a policy in which enemies "may be deprived of property or injured by any means by any Scientologist [and] may be tricked, sued, lied to or destroyed." Pet. App. at 25a.

by the science fiction writer L. Ron Hubbard. This first church later became the Church of Scientology of California, the petitioner in this case. In 1950 Hubbard published a bestseller called *Dianetics: The Modern Science of Mental Health*. This quasi-scientific publication remains a basic text of the Church of Scientology.

Hubbard originally planned that "Dianetics" would be offered as a mental health discipline, but the techniques described in his book came under attack from the American Psychological Association and the American Medical Association. In the face of these attacks, Hubbard founded the Church of Scientology.

Since its founding Scientology has been engaged in many controversies, including its legal confrontations with the Food & Drug Administration and the Internal Revenue Service, and the conviction of several major church leaders for the theft of government documents, perjury, wiretapping, and other federal crimes.

This history of litigation -- often implicating petitioner's claim that its activities were protected by the free exercise clause of the First Amendment -- also was recently described by the Court of Appeals for the District of Columbia Circuit in *Founding Church of Scientology* v. *Webster*, 802 F.2d 1448, 1449-50 (D.C. Cir. 1986), *cert. denied*, 484 U.S. 871 (1987).[3]

Recently, because it was found to have diverted its profits to private individuals, the petitioner here has been determined not to be a tax exempt organization under §501(c)(3) of the Internal Revenue Code. *See Church of Scientology of California* v. *Commissioner of Internal Revenue*, 823 F.2d (9th Cir. 1987), *cert. denied*, 486 U.S. ____, 108 S. Ct. 1752 (1988). *See also Hernandez* v. *Commissioner of Internal Revenue*, ____U.S. ____, 109 S. Ct. 2136, 2142 n. 4 (1989).

During the proceedings below, the trial court determined on a motion for summary judgment that petitioner is a religion, a holding that respondent has challenged repeatedly, as is reflected in his *pro se* Petition for Writ of Certiorari now pending before this Court. *Wollersheim* v. *Church of Scientology of California*, No. 89-1367 (filed February 23, 1990). Although that holding is subject to con-

[3]*See also Wollerheim* v. *Church of Scientology*, No. 89-1367, Pet. at 12-21, 25.

siderable doubt, for purposes of this Brief in Opposition respondent acknowledges that the courts below found petitioner to be a religion and found that the practice of auditing may be a practice entitled to First Amendment protection. What is important about the *petitioner's* Petition for Writ of Certiorari, however, is that the jury, the trial court, and the Court of Appeal all determined, based on the evidence presented in this case, that respondent's participation in "auditing," particularly during and after his imprisonment in 1974, was coerced.

### 3. The Nature of The Proceedings Below.

Petitioner makes the remarkable assertion that in this case it "was subjected to what can only be characterized as a six-month heresy trial." Pet. at 11. It was through the trial tactics of the petitioner that the trial lasted as long as it did. The trial, interrupted several times by appeals and by separate lawsuits filed by petitioner to prevent respondent from having his day in court, finally commenced on February 18, 1986. Respondent called his first witness on February 26. Respondent called a total of 14 witnesses, and rested his case on May 8, 1986.

The length of the plaintiff's case was largely the result of *petitioner's* tactics on cross-examination. For example, the respondent himself testified on direct from April 3 through April 14, over the course of seven (7) trial days. He was then cross-examined by petitioner's counsel from April 14 through April 30, over the course of ten (10) trial days. Similarly, respondent's expert witness, Dr. Margaret Singer, testified on direct from March 12, 1986 through March 17, over the course of four (4) trial days. Her cross-examination by petitioner lasted from March 17 through March 20, over the course of four (4) trial days.

Following the close of plaintiff's case in chief, petitioner called to the stand more than fifty witnesses. The petitioner's defense lasted for six weeks, from May 12, 1986 through June 27, 1986.

The transcript of the trial alone is compiled in 95 separate volumes consisting of 14,800 pages of testimony. It is this record that the petitioner is asking this Court to review, after the California Court of Appeal reviewed the record and determined petitioner's arguments to be without merit, and after the California Supreme Court declined further review.

### 4. A Brief Summary Of The Evidence And The Manner In Which It Was Presented To The Jury.

Respondent's first experience with Scientology came at the age of 19, and he continued to take part in Scientology courses and auditing over the course of ten years. The entire thrust of respondent's case at trial was to demonstrate that the practices of Scientology in which he participated, and to which he was subjected, were neither peaceful, nor voluntary, nor central to any system of religion that was presented to him. Respondent's own testimony in this regard was supported by that of former high ranking Scientologists and that of expert witnesses.[4]

Dr. Margaret Singer, a research and clinical psychologist, testified that respondent experienced a bipolar manic depressive disorder reaching the level of psychosis as a result of having been "subjected to a series of interacting routines [auditing] and behaviors in which he was forced to participate." R.T. at 2192. Dr. Singer testified that respondent had been "desensitized" by Scientology's thought reform program to the extent that when his wife was severely burned in an accident, he acquiesced in the directions of other Scientologists to direct his wife not to sue Scientology or claim disability benefits as a result of the accident. R.T. at 2200. Respondent, according to Dr. Singer, was forced into a state of emotional and financial dependence on Scientology, by a fear of incurring a large "free-loader debt" for the prohibitive costs of Scientology courses and auditing he had earlier received at a member's "discount," by a fear of being declared a "suppressive person" or "SP," which would result in social isolation and mandatory "ethics handling," and by a fear that if he went "against the Church of Scientology [he was] going

[4]For example, Ed Walters, a former Church Guardian office minister, testified that beginning as early as 1976, respondent was declared a suppressive person and was subject to "fair game."

to die." R.T. at 2414-16. Dr. Singer also testified how respondent had been tormented after leaving Scientology by feelings of dread caused in part by successful efforts of the Church of Scientology to ruin his business, by contacts with members who urged him to fire his trial counsel, and by being followed and tracked down. R.T. at 2431-34.

As a result of his experiences in Scientology, respondent not only had been induced into a severe bipolar disorder, but also suffered from panic attacks, psychogenic amnesia, and a post-traumatic stress disorder. Dr. Singer testified that "auditing," as it was experienced by respondent, was part of a process of coercive "thought reform" that precipitated or was the major cause of respondent's severe mental and emotional disorders. *See e.g.*, R.T. at 2502-03.

The trial record also is replete with examples in which the court very carefully prohibited any inquiry into the content of Scientology's beliefs in general, let alone any comment by the witnesses concerning the validity of those beliefs or the sincerity of Scientology's adherents. *See, e.g.*, R.T. at 2045 (court directs respondent's trial counsel and Dr. Singer not to inquire into or comment upon Scientology's belief in and practice of auditing generally, representations made by members of Scientology as to the benefits, nature or efficacy of auditing, or evidence of the alleged success or failure of auditing); R.T. at 2374 (court declines to define for the jury, in response to juror questions, what an "operating thetan" is); R.T. at 2382-2390 (court refuses to permit witnesses to testify concerning any of the content of "upper level" Scientology materials).

Finally, the jury was instructed quite explicitly not to make any judgments about the beliefs of Scientology or to base its findings *in any way* upon the validity of the "religious beliefs and practices of Scientology," including auditing. The Court instructed:

> Now, during the course of the trial you have heard evidence concerning certain of the religious beliefs and practices of the defendant Church of Scientology of California including the practice of auditing. You are instructed that the defendant is a religious organization and that Scientology is a religion and entitled to protection as to its religious

> beliefs and religious practices under the First Amendment of the United States Constitution.
>
> Therefore, during your deliberations you must not and will not make any inquiry into the validity of their religious beliefs and practices of the church or its members as those beliefs and practices, including auditing have become known to you during the trial, nor will you base your verdict in any way on any evaluating of the validity of the religious beliefs and practices of Scientology.
>
> * * * * *
>
> It is not for you, the jury, to attempt to determine the truth of any religious statement, nor is it proper to sift through the teachings of Scientology and pick out individual statements for scrutiny deciding whether each standing alone is religious.

R.T. at 14,778-79.

The jury also was instructed that it could base a verdict for respondent only on "extreme and outrageous conduct . . . which goes beyond all possible bounds of decency so as to be regarded as atrocious and utterly intolerable in a civilized community." R.T. at 14, 786.

It was based on respondent's evidence of physical, financial and psychological coercion, coupled with degradation and psychological dread, and the foregoing instructions, that the jury found petitioner liable for the intentional infliction of emotional distress and awarded substantial compensatory and punitive damages. It was that verdict of liability that the Court of Appeal affirmed, carefully limiting its holding to the facts presented. *See* Pet. App. at 6a, 12a-34a.

## REASONS FOR DENYING THE WRIT

With respect to the issues raised by petitioner, the decision of the California Court of Appeal is correct, and is narrowly circumscribed to the facts presented by this case. The Questions Presented by the petitioner are not fairly presented by the record evidence or the decision below. There is no conflict between the decision below and any decisions of this Court or of other appellate courts, arising from similar factual circumstances. Therefore, review by this Court is not warranted.

### I. The Jury And The Courts Below Did Not Impose Damages Against Petitioner Based Upon Its Free Exercise Of Peaceful Religious Practices.

Contrary to petitioner's assertions, the California courts in this case have not sanctioned the imposition of tort liability against a church based upon "voluntary participation in peaceful religious practices." *See* Pet. at 13. To the contrary, the jury's finding of liability was affirmed solely because sufficient evidence was presented by respondent at trial to show that the practices in question were coercive and were not peaceful. *See* Pet. App. at 22a (practice of "fair game," even if religious, is not immune from civil liability because it was designed to ruin the respondent financially); *id.* at 27a-30a (respondent engaged in specific auditing sessions under the threat of physical compulsion, and a fear of becoming "fair game" and incurring a massive "freeloader debt"; these acts of coercion permeated all of respondent's participation in auditing); *id.* at 32a-33a (respondent was coerced into "disconnecting" from his family); *id.* at 33a-34a (petitioner's disclosure of confidential information about respondent for non-religious purposes is not protected "religious expression").

Recently, petitioner's counsel presented questions to this Court in *Church Universal & Triumphant, Inc.* v. *Witt*, No. 89-672, cert. denied, ____ U.S. ____, 110 S. Ct. 839 (1990), that were nearly identical to the questions presented here. In that case,

however, the issues resolved at trial really involved the church leaders' liability for the perpetration of an elaborate real estate swindle. In this case, as in *Witt*, while petitioner asserts that the issues involve the imposition of tort liability upon a church for engaging in peaceful, voluntary religious practices, the trial record and the Court of Appeal's decision make clear that those broad issues of religious freedom are not presented by this case.

## II. The Judgment Below Could Not Have Rested On A Jury Finding That Violated Petitioner's Free Exercise Rights.

The petitioner's second question presented asks this Court to extend to this case the principle that reversal of a general verdict is required if the verdict may have rested on constitutionally-protected activity. *See e.g., Stromberg* v. *California*, 283 U.S. 359 (1931). In this case, however, the jury was expressly instructed that Scientology was a religion and that "auditing" was part of petitioner's religious beliefs, and that no award of liability could be based upon an evaluation of petitioner's religious beliefs, or upon its religious practices. *See* R.T. at 14, 778-79 (quoted on pages 7-8 *supra*). This Court must assume that the jury followed the instructions it received. *See Delli Paoli* v. *United States*, 352 U.S. 232, 242 (1957).

And, as the Court of Appeal's opinion demonstrates, respondent presented ample evidence to establish petitioner's liability for activities that are *not* protected by the free exercise clause. Therefore, there is no reason to believe that the principles of *Stromberg* were violated by the Court of Appeal's affirmance of the jury's verdict of liability.

## III. The Court of Appeal's Decision Reflects A Careful Review Of The Record.

Petitioner asserts that if the Court of Appeal had engaged in "an independent examination of the whole record" it could not have upheld the jury's finding of liability. *See* Pet. at 23. This assertion

essentially is premised on petitioner's argument that it was engaged in peaceful, voluntary religious practices, and flies in the face of respondent's contrary evidence, and the jury's determination, that petitioner was engaged in an outrageous pattern of coercive and retributive behavior toward respondent that caused him to sustain financial losses and severe psychological and emotional damage.

The Court of Appeal's opinion reflects that it did carefully evaluate petitioner's arguments in the light of the evidence presented at trial, and did engage in the independent examination of the whole record that petitioner seeks. *See* Pet. App. at 6a-9a, 19a-20a, 22a-28a, 33a-34a. This Court should decline petitioner's invitation to sift through the 15,000 pages of trial testimony again, in order to determine whether this Court agrees with the Court of Appeal's affirmance of the jury's verdict.

## IV. The Jury's Award Of Punitive Damages Was Not Based On Petitioner "Providing Its Central Peaceful Religious Practices To A Parishioner."

Petitioner does not assert that a religious organization can never be held liable for punitive damages, but only claims that whenever a church is subjected to tort liability for religious practices -- even coerced or outrageous practices -- its liability must be limited to actual, compensatory damages. Pet. at 26-27 & n.22. Petitioner cites no decision of this Court, or of any state or federal appellate court, adopting the rule it espouses, arguing instead by analogy to the law of libel. *See Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974) (forbidding punitive damage awards to libel plaintiffs unless they meet the constitutional test of "actual malice"). Moreover, the decision of the Court of Appeal reflects great solicitude toward petitioner's free exercise claims, particularly in reducing the jury's award of punitive damages from $25 million to $2 million. *See* Pet. App. at 42a-43a.[5]

---

[5]Respondent has challenged the reduction of his damages in the courts below, and in his pending Petition for Writ of Certiorari. *See Wollersheim* v. *Church of Scientology of California*, No.89-1367, Pet. at 23-24.

The issue presented by petitioner is better left for resolution by this Court in another case for several reasons. *First*, this Court historically has been reluctant to modify the states' substantive laws of tort liability and remedies on constitutional grounds. And there are no reported decisions of which respondent is aware accepting petitioner's assertion that punitive damages may not be imposed based on certain forms of tortious conduct by a religious organization. Indeed, that argument was flatly rejected in *Christofferson* v. *Church of Scientology of Portland*, 57 Or. App. 203, 644 P. 2d 577, 607-08 (1982), *cert. denied*, 459 U.S. 1206 (1983).

*Second*, in this case, the award of punitive damages was predicated not only on "coercive" practices that petitioner claimed to be part of its religious beliefs, but also on acts that were not afforded any protection at all by the free exercise clause -- including the "fair game" campaign of retribution against the respondent, and the revelation of confidential information about respondent for non-religious purposes. *See* Pet. App. at 18a-22a, 33a-34a.

*Third*, the jury in this case was instructed to award punitive damages only if it found petitioner to be "guilty of oppression or malice" toward the respondent. R.T. at 14,795. "Malice" was defined for the jury as conduct "intended by the [petitioner] to cause injury to the [respondent] or carried on by the [petitioner] with a conscious disregard for the rights or safety of the [respondent]." R.T. at 14,796. "Oppression" was defined as "subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights." *Ibid.*

Under the foregoing instructions, it is not realistic to assume that the jury's award of punitive damages in this case was based, even in part, on any activities by the petitioner that were legitimate objects of First Amendment protection. Certainly, punitive damages were not imposed as a result of Scientology providing its "central, peaceful religious practices" to a willing parishioner. *Cf.*, *Gertz*, *supra*, 418 U.S. at 350 (punitive damages may be recovered by a libel plaintiff where the "actual malice" standard of liability is met).

## V. Petitioner's Due Process Rights Were Not Violated By The Jury's Award Of Punitive Damages, Substantially Reduced By The Court Of Appeal.

In at least five Petitions for Writ of Certiorari filed and decided since this Court's decision last Term in *Browning-Ferris Industries, Inc.* v. *Kelco Disposal, Inc.*, ____ U.S. ____, 109 S. Ct. 2909 (1989), petitioners have asked this Court to resolve the question whether the Due Process Clause imposes substantive or procedural limits on jury awards of punitive damages. *See, e.g., Vintage Enterprises, Inc.* v. *Jaye*, No. 89-456, *cert. denied*, ____ U.S. ____, 110 S. Ct. 377 (1989); *Clardy* v. *Sanders*, No.89-440, *cert. denied*, ____ U.S. ____, 110 S. Ct. 376 (1989); *Combined Insurance Co. of America* v. *Ainsworth*, No. 89-282, *cert. denied*, ____ U.S. ____, 110 S. Ct. 376 (1989); *Volkswagen of America, Inc.* v. *Gibbs*, No. 89-228, *cert. denied*, ____ U.S. ____, 110 S. Ct. 418 (1989); *Alcolac Inc.* v. *Elam*, No. 88-1992, *cert. denied*, ____ U.S. ____, 110 S. Ct. 69 (1989). This Court denied the petitions in each of these cases, and should deny this Petition as well.

This case does not even present the question whether the Due Process Clause may be violated by rules of law that permit juries unbridled discretion to award punitive damages, without adequate judicial guidance or control. Rather, the Court of Appeal in this case clearly imposed substantive limits on the jury's discretion to award punitive damages. In reducing the jury's award of punitive damages from $25 million to $2 million, the Court was guided by a three-factor test adopted in prior California appellate decisions evaluating jury awards of punitive damages. Thus, the reduction of the jury's award in this case was premised on the Court of Appeal's independent assessment of the "degree of reprehensibility of the [petitioner's] conduct," the ratio of compensatory damages to punitive damages, and the relationship of the award to the petitioner's net worth. *See* Pet. App. at 42a-43a.[6]

---

[6]The respondent has challenged the Court of Appeal's application of those criteria to the facts of this case. *See* footnote 5 *supra*.

In some jurisdictions, reviewing courts are not empowered to adjust a jury's award of punitive damages based on a lack of proportionality to the compensatory damages suffered by the plaintiff. That is not the law in California, however, as demonstrated by the opinion below. Thus, this case does not present an appropriate occasion for this Court to seek to resolve the Due Process questions left unanswered in *Browning-Ferris*.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

WILLIAM JAMES MURPHY
Counsel of Record

MURPHY & McDANIEL
118 West Mulberry Street
Baltimore, Maryland 21201
(301) 685-3810

Attorneys for Respondent
Larry Wollersheim

Dated: March 27, 1990

No. 89-1361

Supreme Court, U.S.
FILED
APR 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

*Petitioner*,

—v.—

LARRY WOLLERSHEIM,

*Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ERIC M. LIEBERMAN
Counsel of Record
DAVID B. GOLDSTEIN
RABINOWITZ, BOUDIN, STANDARD, KRINSKY & LIEBERMAN, P.C.
740 Broadway-Fifth Floor
New York, New York 10003-9518
(212) 254-1111

MICHAEL LEE HERTZBERG
740 Broadway-Fifth Floor
New York, New York 10003
(212) 982-9870

*Attorneys for Petitioner Church of Scientology of California*

Dated: April 6, 1990

## TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ..... ii

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI ..... 1

CONCLUSION ..... 10

## TABLE OF AUTHORITIES


| Cases | PAGE |
|---|---|
| *Bear* v. *Reformed Mennonite Church*, 462 Pa. 330, 341 A.2d 105 (1975) | 9 |
| *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) | 6 |
| *Founding Church of Scientology* v. *United States*, 409 F.2d 1146 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969) | 9 |
| *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) | 6, 7 |
| *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42 (1979) | 6 |
| *NAACP* v. *Claiborne Hardware*, 458 U.S. 886 (1982) | 4, 5, 9 |
| *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) | 9 |
| *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981) | 6 |
| *Pacific Mutual Life Ins. Co.* v. *Haslip*, No. 89-1279, *cert. granted* (U.S. April 2, 1990) | 7 |
| *Pacific Mutual Life Ins. Co.* v. *Haslip*, 553 So.2d 537 (Ala. 1989), *cert. granted*, No. 89-1279 (U.S. April 2, 1990) | 7 |
| *Paul* v. *Watchtower Bible & Tract Society*, 819 F.2d 875 (9th Cir.), *cert. denied*, 484 U.S. 926 (1987) | 9 |
| *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966) | 5 |
| *United States* v. *Fishman*, No. CR-88-0616-DLJ (N.D. Cal. March 15, 1990) | 3 |

PAGE

**Constitutional and Statutory Provisions**

U.S. Const. Amend. I .....2, 6, 9

U.S. Const. Amend. XIV ..... 7

Cal. Civ. Code § 3294(b)..... 7

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondent Larry Wollersheim rests his opposition to the petition of the Church of Scientology of California ("the Church") on the demonstrably false premise that the jury must be presumed to have returned its verdict based upon unprotected acts of secular coercion and not on the basis of Wollersheim's voluntary participation in auditing, *per se*, which the courts below found to be a religious practice.[1] Church's Petition ("Pet.") at 23a, 48a, 51a. Thus, Wollersheim relies upon the court of appeal's conclusion that there was sufficient evidence in the record to show that Wollersheim participated in auditing because of secular coercion, Respondent's Brief in Opposition ("Resp. Br.") at 9, and the trial court's instruction that the jury not evaluate the *validity* of Scientology's beliefs or practices, *id.* at 7-8, 10.

Wollersheim's new counsel attempts to rewrite the history of this case, much of which was written by Wollersheim and his prior counsel over a ten year period. As amply demonstrated in the Church's petition, it simply is uncontrovertible that Wollersheim and his trial counsel repeatedly invited the jury to evaluate the purported emotional *effect* of auditing upon Wollersheim, and to award compensatory and punitive damages if it found that auditing caused emotional distress and constituted "outrageous conduct". Pet. at 3-7, 10. The trial court's instructions not only did not attempt to prevent the jury from doing so, but, in the context of the trial,

---

1 By the term "secular coercion," the Church distinguishes the "coercion" theory created by the court of appeal, Pet. at 25a, from the "coercive persuasion" or "thought reform" that Wollersheim alleges is inherent in Scientology's core religious practice of auditing, and upon which Wollersheim based his theory of liability at trial. Throughout this case, Wollersheim has claimed that his participation in auditing was "involuntary" solely because auditing itself constituted "thought reform," which led him to undertake more auditing. *See* Church's Pet. at 16-20; Brief of National Council of Churches of Christ in the USA and Council on Religious Freedom As Amicus Curiae, at 6-13 (discussing "coercive persuasion" theory presented by Wollersheim).

invited it to do so. And the court of appeal's effort to find some evidence to support an alternative theory of secular coercion that was never argued or presented to the jury violates every known principle of appellate review in a case involving possible infringement of First Amendment rights.

1. Wollersheim mistakenly argues that the jury was instructed that it could not find liability "based upon an evaluation of petitioner's religious beliefs, or upon its religious practices." Resp. Br. at 10. Wollersheim then argues that since the jury must be presumed to have followed the court's instruction, the jury's verdict could not possibly have turned upon an evaluation of the harms allegedly caused by the religious practice of auditing.

Wollersheim fundamentally mischaracterizes the trial court's instruction, which merely instructed the jury that it could not "base [its] verdict in any way on any evaluating of the *validity* of the religious beliefs and practices of Scientology" (RT 14,778) (emphasis added).[2] The trial court *refused* to give an instruction, requested by the Church, that the jury could not base its verdict based upon an evaluation of the purported emotional *effect* of auditing upon Wollersheim (App. A312).

The distinction is no mere quibble; it goes to the heart of Wollersheim's case. As demonstrated in the Church's petition, from beginning to end Wollersheim emphasized to the jury his claim that auditing, *per se*, caused him emotional distress and constituted outrageous conduct. Pet. at 4-5. In his closing argument to the jury, Wollersheim's counsel stated:

> [P]laintiff was subjected to Level II programming or auditing by the defendant . . . which conduct was extreme and outrageous . . . . [RT 14,456] . . . plaintiff experienced severe personality stress caused by auditing. . . . [RT 14,460] . . . for periods of time he was a psychotic as a result of this auditing surfacing or precip-

---

2 Citations to "RT _____" are to the Reporters Transcript of the trial court proceedings. References to "App. A _____" are to pages in the Appellant's Appendix in Lieu of Clerk's Transcript, filed in the court of appeal.

> itating the symptoms of the bipolar disorder . . . without his auditing he probably never would have been bothered by [bipolar disorder] in his whole life. [RT 14,493]. . . . In the process of subjecting Larry Wollersheim to the auditing, [the Church] precipitated his bipolar disorder. [It was] precipitated by . . . *particularly* the auditing processing . . . . [RT 14,713].

*See also* RT 14,467; 14,490-93.

Both in the Supreme Court of California and here, Wollersheim himself has acknowledged that his theory of the case at trial rested principally upon his claim that auditing was "outrageous conduct". In his petition to this Court, No. 89-1369, for example, Wollersheim states that his "evidence and experts demonstrated auditing was *inherently* and *intrinsicly* [sic] a coercive persuasion type practice based on creating hypnotic or trance like states of increased suggestibility and decreased independent judgment."[3] Wollersheim Petition at 4 (emphasis added). He acknowledges that the so-called "upper level" auditing "materials were the very areas most closely associated with the five cataclysmic breakdowns." *Id.* He concludes that "there is adequate proof the coercive persuasion aspects of auditing caused real [emotional] harm to Wollersheim and that Scientology's conduct was outrageous." *Id.* at 7; *see also* Pet. at 10 (quoting Wollersheim's Petition for Review in the Supreme Court of California).

---

3 The "experts" relied upon by Wollersheim were psychologist Margaret Singer and sociologist Richard Ofshe, who recently have been precluded by a federal district court in California from testifying as experts on "coercive persuasion" and "thought reform" on the ground that their theories are "not widely recognized in the scientific community." *United States* v. *Fishman*, No. CR-88-0616-DLJ (N.D. Cal. March 15, 1990). The fact that Wollersheim would have been prevented from presenting his theory of recovery if he had sued in federal court in California under diversity jurisdiction, but instead was permitted to obtain a jury verdict of $30,000,000 based upon that theory because of the happenstance that he sued in the California *state* courts, further highlights the conflict among the lower courts concerning claims, of "thought reform" against minority religions. See Church's Brief in Opposition to Wollersheim's Petition for Writ of Certiorari, No. 89-1369, at 3 n.3.

Indeed, Wollersheim directly contradicts himself in his Brief in Opposition. While arguing at one point that the jury must be presumed not to have considered a claim based upon auditing, Resp. Br. at 10, he admits elsewhere that his claim was based precisely on Singer's testimony that auditing "was part of a process of coercive 'thought reform' that precipated or was the major cause of respondent's severe mental and emotional disorders." Resp. Br. at 7.

In short, it simply is absurd to claim, as Wollersheim does here, that it must be presumed that the jury did not base its verdict, at least in major part, upon the purported emotional effect of auditing upon Wollersheim. In the context of the testimony of Wollersheim, Singer, and Ofshe, and of the closing argument of Wollersheim's counsel, the court's instruction that the jury not "evaluate" the "validity" of Scientology beliefs and practices clearly was not understood by Wollersheim's counsel or the trial court, and could not possibly have been understood by the jury, as precluding evaluation of the very claim most heavily emphasized by Wollersheim, *i.e.*, the alleged *effect* of auditing upon Wollersheim.

Thus, at the least, "[i]t is impossible to conclude that state power has not been exerted to compensate [Wollersheim] for the direct consequences of *nonviolent*, constitutionally protected [auditing] activity." *NAACP* v. *Claiborne Hardware*, 458 U.S. 886, 923 (1982) (emphasis added).

2. Further contradicting his argument that the jury did not base its verdict at all on auditing, Wollersheim argues that he *did* recover damages for auditing purportedly undertaken as a result of secular coercive acts. Resp. Br. at 9-10. This is the first time in the ten year history of this case that Wollersheim himself has made this argument, in contrast to his claims that he undertook auditing because of the "coercive persuasion" purportedly "inherent" in the religious practice of auditing itself. *See*, *e.g.*, Wollersheim Petition, No. 89-1369, at 4. In any event, his wholly conclusory argument derives solely from the improper and unsubstantiated findings of the court of appeal. Wollersheim does not deny his own extensive testi-

mony and that of Singer that Wollersheim participated in auditing because he wanted to, that he became "addicted" to auditing, and that he continued to engage in it voluntarily. Pet. at 4-6. Indeed, he does not point to a single passage in the trial transcript where he testified that he was forced or threatened to continue auditing, or where he limited his theory of recovery to the secular coercion theory created by the court of appeal. He certainly does not and cannot point to a jury instruction which limited the jury to a finding of liability if and only if, and only to the extent that Wollersheim was induced to participate in auditing by secular coercion. To the extent that Wollersheim relied upon a theory of secular coercion, such a limiting instruction was required by *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 730-35 (1966), and *Claiborne Hardware*, 458 U.S. at 915, 917-18, 923.[4]

Rather, like the court of appeal, Wollersheim asserts that the jury *might* have found that some of Wollersheim's auditing was induced by secular coercion, and that the jury *might* have based its verdict upon such coerced auditing. Resp. Br. at 9. Even accepting that possibility (which we do not), it does not negate the possibility (indeed, the virtual certainty) that the jury returned its verdict based upon the harms purportedly caused by auditing, *per se*. As the Church has repeatedly shown, where the possibility exists that damages were imposed for constitutionally protected activity, the verdict must be reversed, not affirmed. Pet. at 20-23.

Faced with the failure of the trial court to limit the jury solely to consideration of unprotected activity, the court of appeal purported to find some evidence of unprotected, coercive activity which, if standing alone, might justify a verdict for Wollersheim. For the reasons stated in the Church's petition, the court of appeal's failure to review independently the record and its refusal to reverse and remand for a new trial turned upside down the constitutionally mandated rules for appellate review of a case involving claims that rest in whole

---

4 No such jury instruction was suggested or contemplated by either party or by the trial court precisely because that was never Wollersheim's theory of recovery at trial.

or in part upon activity presumptively within the zone of First Amendment protection.[5] *See* Pet. at 20-26.

3. Wollersheim's response to the Church's argument that the $2,000,000 punitive damage award violates the First Amendment is wholly premised on the same mistaken assumption as his argument in support of the jury's finding of liability—that the jury's award of punitive damages could not be "based, even in part, on any activities" protected by the First Amendment. Resp. Br. at 12. As demonstrated, *supra*, and in the Church's Petition, however, liability and damages were almost certainly imposed for the Church's peaceful religious practice of auditing. Even if there are circumstances which would permit imposition of compensatory damages arising out of such religious practices, the state has no compelling interest in providing a windfall in the form of punitive damages. *See Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974). The same concerns about "punish[ing] expressions of unpopular views" that the Court expressed in *Gertz*, *id.* at 350, is at least equally applicable with regard to minority religions. Similarly, members of a religious organization, who are the true victims of ruinous punitive damage awards, should receive the same protections as members of labor unions or municipal taxpayers. *See Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981); *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 50-51 (1979).

---

5 Wollersheim's conclusory assertion that the court of appeal "did engage in the independent examination of the whole record that petitioner seeks," Resp. Br. at 11, is demonstrably false. The court of appeal explicitly reviewed the evidence only to determine whether "[t]here is substantial evidence to support the jury's finding" on the secular coercion theory. Petition at 10a. No effort was made to review independently the record in the manner mandated by cases such as *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). *See* Pet. at 23-26. While asserting that the court of appeal examined the whole record, Wollersheim in fact highlights the absence of evidence to support the court of appeal's novel secular coercion theory in his failure to cite to a single passage in the record in support of this theory.

4. This Court has just granted review in a case raising a Fourteenth Amendment due process challenge to an award of punitive damages virtually identical to the Church's due process claim here. Pet. at 28-29. *Pacific Mutual Life Ins. Co.* v. *Haslip*, No. 89-1279, *cert. granted* (U.S. April 2, 1990). This case, like *Haslip*, compellingly demonstrates the due process problems inherent in a punitive damage system under which the jury is instructed that "[t]he law provides no fixed standard . . . [b]ut leaves the amount to the jury's sound discretion" (RT 14,796), and that punitive damages may be awarded against a corporation on a *respondeat superior* basis (RT 14,783-84). Indeed, in this case, the *respondeat superior* instruction was given in apparent disregard of state law that requires ratification of an agent's acts by the corporation, thereby exacerbating the unbridled discretion of the trial court and jury by this disregard of the one limitation established by the legislature. *See* Cal. Civ. Code § 3294(b); Church's Pet. at 28 n.23.

Wollersheim argues that the court of appeal's remittitur cures the due process violation. Resp. Br. at 13. In fact, that court's unexplained imposition of a $2,000,000 award, while less "preposterous," Pet. at 43a, than the jury's $25,000,000 award, is no less arbitrary or irrational. This case is no different than *Haslip*, in that the potential for judicial review and remittitur does not cure the due process violation. *Pacific Mutual Life Ins. Co.* v. *Haslip*, 553 So.2d 537, 543 (Ala. 1989).[6] In fact, this case is more worthy of review because it raises the added spectre of the standardless imposition of punitive damages to "punish . . . unpopular views." *Gertz*, 418 U.S. at 350.

---

6 In *Haslip*, the Alabama Supreme Court found that the trial court applied the appropriate principles of law to the punitive damage claim, held a hearing, and set out the reasons why the award should be sustained, and the state Supreme Court found that the facts supported the trial court's decision. 553 So.2d at 543. Here, by contrast, the trial court simply issued a one-word denial to the Church's post-trial attack on the verdict. Pet. at 45a. The court of appeal adequately explained why the $25,000,000 award was "preposterous," Pet. at 43a, but it never attempted to justify its own $2,000,000 punitive damage award. Pet. at 42a-43a.

5. Wollersheim's statement of the case, Resp. Br. at 2-8, contains several significant misstatements, which the Church corrects only to demonstrate that this case directly presents the fundamental constitutional questions raised by the Church's petition.

First, Wollersheim claims "that the petitioner's practice of 'auditing' never was presented to him as a religious practice." Resp. Br. at 2. Based on irrefutable evidence to the contrary, however (RT 1169-70, 1257-60, 4960-62, 7553; Exhibits 90, 244, 253, 255(a), 263, 317), the trial court explicitly rejected this contention and cut off further evidence or argument on the subject (RT 7177-79, 7182-83, 7194, 7227), stating: "Listen, [Wollersheim] can't tell us—I don't think he can tell us in light of his many acknowledgments in writing, in agreements between himself and the Church, that the nature of what's going on is not religious." (RT 7227).

Second, Wollersheim asserts that he was held against his will on a ship for six weeks in 1974 where he was forced to undergo "relentless 'coerced' auditing." Resp. Br. at 2. Wollersheim, however, did not testify that he was forced to go aboard the ship against his will. He stated only that at one point he attempted to leave, and that three Scientologists restrained him for a few moments, after which Wollersheim agreed to talk; after a half hour to an hour of talking, he agreed to stay. (RT 5019). There was no testimony that Wollersheim was required to undergo "relentless auditing," "coerced" or otherwise while on the ship. Most important, Wollersheim's claim of outrageous conduct was in no way limited to this single brief incident of alleged physical restraint.

Third, Wollersheim states that he "was urged by petitioner to 'disconnect' from his family because of concerns they expressed about his continued membership in the group." Resp. Br. at 2. Aside from the fact that such conduct would

be protected by the First Amendment,[7] there simply was no testimony that it occurred in this case. *See* Pet. at 6-7, 15 nn. 11-12.

Fourth, Wollersheim's account of "the nature of Scientology," Resp. Br. at 3-4, is both without record foundation and inaccurate. Suffice it to say, numerous courts have found that Scientology is a religion entitled to the protection of the First Amendment, often in cases in which the United States government has agreed and stipulated to that fact. *See* Church's Brief in Opposition to Wollersheim's Petition for Writ of Certiorari, No. 89-1369, at 5-8 & n.8.

These and other factual disputes are collateral in the context of the jury's general verdict on an intentional emotional distress claim that was based predominantly on Wollersheim's participation in auditing. If, as the Church argues, the auditing claim should have been barred or limited under the First Amendment, reversal of the verdict is required even assuming one or more of the other components of Wollersheim's emotional distress claim may have been actionable. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 289 (1964); *Claiborne Hardware*, *supra*, 458 U.S. at 917-18; *Founding Church of Scientology* v. *United States*, 409 F.2d 1146, 1164 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969); *see* Church's Pet. at 20-23. Thus, this Court need not concern itself with the parties' disagreements over what was or was not proven with respect to Wollersheim's other theories of recovery. This case clearly presents the fundamental constitutional questions raised by the petition, which cry out for resolution by this Court.

---

7 *See Paul* v. *Watchtower Bible & Tract Society*, 819 F.2d 875 (9th Cir. 1987), *cert. denied*, 484 U.S. 926 (1987). *But see Bear* v. *Reformed Mennonite Church*, 462 Pa. 330, 341 A.2d 105 (1975). The court of appeal noted an apparent conflict between *Paul* and *Bear*, but failed to resolve it. *See* Pet. at 20a-21a.

## CONCLUSION

For the reasons stated herein and in the Petition, the petition for a writ of certiorari should be granted.

Dated: April 6, 1990

Respectfully submitted,

ERIC M. LIEBERMAN
*Counsel of Record*
DAVID B. GOLDSTEIN
RABINOWITZ, BOUDIN, STANDARD,
KRINSKY & LIEBERMAN, P.C.
740 Broadway - Fifth Floor
New York, New York 10003-9518
(212) 254-1111

MICHAEL LEE HERTZBERG
740 Broadway - Fifth Floor
New York, New York 10003
(212) 982-9870

*Attorneys for Petitioner*
*Church of Scientology*
*of California*

MOTION FILED
MAR 2 8 1990

No. 89-1361

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
*PETITIONER,*

V.

LARRY WOLLERSHEIM,
*Respondent.*

**On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District**

## MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A. AND COUNCIL ON RELIGIOUS FREEDOM AS AMICI CURIAE IN SUPPORT OF THE PETITIONER CHURCH OF SCIENTOLOGY OF CALIFORNIA

LEE BOOTHBY
*(Counsel of Record)*
BOOTHBY, ZIPRICK & YINGST
9047 US 31 North, Suite 201
Berrien Springs, MI 49103
(616) 471-7787

ROBERT W. NIXON
12501 Old Columbia Pike
Silver Spring, MD 20904-1608
(301) 680-6320

*Attorneys for* Amici Curiae

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

No. 89-1361

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
*Petitioner,*

v.

LARRY WOLLERSHEIM,
*Respondent.*

**On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District**

## MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The National Council of Churches of Christ in the U.S.A. and Council on Religious Freedom respectfully move this Court for leave to file the attached brief as amici curiae in support of the Petition for Writ of Certiorari filed by the Church of Scientology of California pursuant to Rule 36.1 of this Court's rules. The Brief Amici Curiae is being conditionally filed with this Motion, copies of which have been served upon all parties. The written consent of the petitioner is filed concurrently herewith. The respondent has failed to indicate his position.

The National Council of Churches and Council on Religious Freedom believe that the issues presented in the Petition for Writ of Certiorari are of vital interest to their respective constituents. Some of the denominations

represented by the National Council of Churches are congregational and, if subjected to a punitive damage award of even a fraction of the award involved here, would be profoundly fiscally jeopardized.

The National Council of Churches and Council on Religious Freedom believe that the Petition filed in this case does not apprise this Court of the full extent of the problems posed by the "heresy" trials (such as has occurred here), as well as the far-reaching and chilling impact that punitive damage awards have against religious bodies.

Dated: March 28, 1990

Respectfully submitted,

LEE BOOTHBY
*(Counsel of Record)*
BOOTHBY, ZIPRICK & YINGST
9047 US 31 North, Suite 201
Berrien Springs, MI 49103
(616) 471-7787

ROBERT W. NIXON
12501 Old Columbia Pike
Silver Spring, MD 20904-1608
(301) 680-6320

*Attorneys for* Amici Curiae

## TABLE OF CONTENTS


| | Page |
|---|---|
| MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE | i, ii |
| TABLE OF AUTHORITIES | iv |
| STATEMENT OF INTEREST | 1 |
| SUMMARY OF ARGUMENT | 3 |
| ARGUMENT | |
| I. THIS CASE PRESENTS THE NOVEL ISSUE OF WHETHER THE RELIGION CLAUSES OF THE FIRST AMENDMENT PROHIBIT THE COURT FROM PERMITTING A JURY TO WEIGH THE BELIEFS AND TEACHINGS OF A CHURCH ON THE BASIS OF "EXPERT TESTIMONY" THAT IS INTRODUCED TO PROVE THAT ADHERENCE TO A RELIGIOUS BELIEF RESULTS FROM ALLEGED COERCIVE PERSUASION | 4 |
| II. THE IMPOSITION OF PUNITIVE DAMAGES AGAINST RELIGIOUS INSTITUTIONS FOR A TORT CLAIM ARISING OUT OF RELIGIOUS PRACTICES VIOLATES THE FIRST AMENDMENT | 13 |
| CONCLUSION | 19 |

## TABLE OF AUTHORITIES

CASES:

*Founding Church of Scientology* v. *United States*, 409 F.2d 1146 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969) ..... 6

*George* v. *ISKCON*, 213 Cal. App. 3d 729 (1989)..... 5, 8

*Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974)..... 15, 16

*International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42 (1979) ..... 18

*Katz* v. *Superior Court*, 73 Cal. App. 3d 952 (1977)..... 6

*Molko* v. *Holy Spirit Association*, 46 Cal. 3d 1092, 252 Cal. Reptr. 122, 762 P.2d 46 (1988)..... 7, 8

*Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981).... 18

*New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964)..... 14, 15, 17

*Rosener* v. *Sears Roebuck & Co.*, 168 Cal. Rptr. 237 (Cal App. 1980) ..... 15

*Sherbert* v. *Verner*, 374 U.S. 398 (1963) ..... 15

*United States* v. *Ballard*, 322 U.S. 78 (1944)..... 4, 5, 11

*Woolstrum* v. *Maillous*, 190 Cal. Rptr. 729 (Cal. App. 1983)..... 14

*Wisconsin* v. *Yoder*, 406 U.S. 205 (1972)..... 15

CONSTITUTIONAL AUTHORITY:

United States Constitution, Amendment One..... *passim*

OTHER AUTHORITIES:

Holy Bible, Hebrews 11:1..... 11

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

---

**No. 89-1361**

---

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
*Petitioner,*

v.

LARRY WOLLERSHEIM,
*Respondent.*

---

**On Petition For A Writ Of Certiorari To The Court of Appeal Of The State Of California, Second Appellate District**

---

## BRIEF OF THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A. AND COUNCIL ON RELIGIOUS FREEDOM AS AMICI CURIAE IN SUPPORT OF THE PETITIONER CHURCH OF SCIENTOLOGY OF CALIFORNIA

---

### STATEMENT OF INTEREST

The National Council of Churches of Christ in the U.S.A. is the cooperative agency of 32 national Protestant and Eastern Orthodox religious bodies in the United States, having an aggregate membership of over 40 million. This brief does not purport to represent the views of all of those persons, but is based on policies determined by their representatives sitting as the Governing Board of the National Council of Churches, a deliberative body of

about 250 persons chosen by the member denominations in proportion to their size and support of the Council. The policy which underlies this action was expressed by the Board in 1955: "The National Council of Churches defends the rights and liberties of cultural, racial and religious minorities." Policy Statement: Religious and Civil Liberties in the U.S.A.

The National Council of Churches believes that novel theories of tort liability based upon religious practices and beliefs pose a serious threat to the religious freedom of its member churches. It further believes that it is imperative that churches have ready recourse to the appellate courts in order to protect their First Amendment rights.

The Council on Religious Freedom is a nonprofit corporation formed to uphold and promote the principle of religious liberty. The organization's objectives and purposes include promoting the constitutional principle of the free exercise of religion, opposing any encroachment by governmental agencies, including the judicial branch of government, which would limit or tend to inhibit such exercise, and responding to other acts interfering with the full experience of religious freedom.

The Council is a membership organization with dues-paying members located throughout the United States. The Board of Directors of the Council on Religious Freedom is composed of individuals who are active in religious affairs, some in an official capacity and some on a lay basis, but all recognize the importance of preserving and promoting the right of religious organizations to carry out their ministries free from governmental intrusion, whether that interference be from the executive, legislative, or judicial branches of the government.

The Council on Religious Freedom speaks to the legal issues raised by this litigation, not because it supports the doctrinal interests or aligns itself with the Church of

Scientology, but because of a more far-reaching concern that "heresy trials" will become vogue particularly as against disfavored religious groups and because punitive damages have now become a weapon to destroy churches and violate First Amendment projections.

## SUMMARY OF ARGUMENT

Although the trial court in this case apparently believed that First Amendment rights of the Church of Scientology were given sufficient protection so long as the content of its religious practice was not placed before a jury, it nevertheless allowed the trial to be turned into a "heresy trial" by the introduction of "expert testimony" as to the psychological effect that such religious practices allegedly caused.

Amici are concerned with the introduction of such testimony before a jury in a case which claims that the plaintiff was the victim of intentional infliction of emotional distress visited by his church because, although the plaintiff voluntarily participated in the religious practice later condemned by his "experts," the condemnation is based upon the expert's theory that plaintiff's change in lifestyle resulted from "coercive persuasion." Amici believe that a close analysis will demonstrate that plaintiff's experts were in fact questioning the validity of the Scientology faith.

One expert at the trial concluded that the Church had engaged in coercive persuasion by finding the existence of certain elements in the structure and practice of the Church. Amici, however, believe that each of these discovered elements will normally be found as part of the practices of most religious groups which are successful in their efforts to proselytize and is normally referred to by mainline religions as the "conversion experience."

The expert's opinion must by its very nature be based upon a subjective determination as to the validity of a religion in order to distinguish those religious groups that engage in "thought reform" and those that do not.

Another of plaintiff's expert's testimony was based upon the assumption that Scientology is not valid, that those members who give public testimony as to their beliefs were prevaricators, that the Church's purported mission to save the world was a fraud, and that Scientology could not solve plaintiff's problems, but psychology could.

Such assumptions made by these experts and communicated to the jury turned the judicial proceedings into a heresy trial condemned in *United States* v. *Ballard*, 322 U.S. 78 (1944).

Compounding the problem is the fact that through the utilization of a punitive damage award, such a heresy trial becomes an effective means for the destruction of a disfavored religious organization.

Amici believe that allowing the jury to award punitive damages in this and similar cases violates the First Amendment. Amici contend that churches should enjoy at least as much protection from the imposition of punitive damage awards as do municipal governments and labor unions. They further believe that the fourth estate should not be preferred over the first estate—the church.

## ARGUMENT

### I. THIS CASE PRESENTS THE NOVEL ISSUE OF WHETHER THE RELIGION CLAUSES OF THE FIRST AMENDMENT PROHIBIT THE COURT FROM PERMITTING A JURY TO WEIGH THE BELIEFS AND TEACHINGS OF A CHURCH ON THE BASIS OF "EXPERT TESTIMONY" THAT IS INTRODUCED TO PROVE THAT ADHERENCE TO A RELIGIOUS BELIEF RESULTS FROM ALLEGED COERCIVE PERSUASION.

Amici curiae do not assert that the First Amendment protects all actions of a religious organization or that tort

proceedings against a religious organization in all instances amount to a heresy trial of that organization. However, amici believe that the judgment in this case was the culmination of a trial on the truth or falsity of doctrine of the Church of Scientology in violation of the fundamental constitutional principles advanced in *United States* v. *Ballard*, 322 U.S. 78 (1944). Amici are not simply altruistic in this filing but firmly believe that what occurred in the instant case may be experienced by numerous other churches. What occurred at the trial court level represents one of several "heresy trials" that, if left untouched by standards and teachings developed by this Court, will have a major chilling effect on the free exercise rights of religious congregations throughout this country.[1]

The trial court seemed to feel that First Amendment rights of the defendant church were given sufficient protection so long as the content of the church's religious practice referred to as "auditing" was not put before the jury, even though the jury was presented with evidence as to the psychological effect that certain auditing courses were alleged to have had on the plaintiff and was asked to award damages based on this effect. The curious distinction, in the view of amici, does not however satisfy the requirements of the First Amendment.

> The *Ballard* case does not hold merely that religious belief is protected. The Ballards engaged in action; they solicited money from the faithful. Rather, the holding of the case seems to be that regulation of

---

[1] This is one of two cases where petitions for writ of certiorari have been filed with and are now pending before this Court. Both this case and *George* v. *ISKCON*, 213 Cal. App.3d 729 (1989), *petition for cert. filed*, 58 U.S.L.W. 3598 (U.S. March 20, 1990) (No. 89-1399), raise the same issues and provide this Court with the opportunity to review both cases together and to provide guidance to the trial courts in cases which are certain to arise in the future.

> religious activity which involved testing in court the truth or falsity of religious belief is barred by the First Amendment.

*Founding Church of Scientology* v. *United States*, 409 F.2d 1146, 1156 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969). Amici believe that the court in *Founding Church of Scientology* was correct in holding that action, as well as belief, is protected by the Free Exercise Clause.

In this case, the question was whether the plaintiff was entitled to recover on the theory of intentional infliction of emotional distress. The plaintiff faced a major hurdle for recovery due to the fact that he had voluntarily and eagerly participated in the religious practice of that church. In order to overcome this hurdle the plaintiff called two expert witnesses. First, Dr. Margaret Singer testified that Scientology practices and procedures constituted a "thought reform" program that was intended to, and did, deprive the plaintiff of his independent judgment and subjected him to the control of the Church of Scientology. Thereafter, the plaintiff argued that his conversion to Scientology was invalid. Next, Dr. Richard Ofshe testified that the Church of Scientology and its practices were intentionally structured in a way that would cause the plaintiff emotional distress. Wholly apart from the very dubious scientific bases for these two "expert" opinions, amici believe that admission of testimony of these two experts violated the First Amendment rights of the Church of Scientology.

The theory advanced by Dr. Singer has been recognized by courts confronted with it as repugnant to the First Amendment when presented as evidence in a courtroom. In *Katz* v. *Superior Court*, 73 Cal. App. 3d 952, 987 (1977), the court said: "When the court is asked to determine whether that change [of lifestyle] was induced by faith or by coercive persuasion is it not in turn investigating and questioning the validity of that faith?"

Dr. Singer's theory is that when certain elements can be found in the structure and practice of an organization, that organization is practicing thought reform, and individuals subject to the practices of that organization are victims of "coercive persuasion." There are six elements to Dr. Singer's model of thought reform programs. First, the organization must gain control of the individual's physical and social environment. Second, it must create a sense or powerlessness in the individual. Third, it manipulates rewards, punishments, and experiences to suppress old social behavior. Fourth, it manipulates rewards, punishments, and experiences to elicit new social behavior. Fifth, the person is kept unaware that he is being exposed to a program that is gradually changing his behavior. Sixth, the process must take place in a totalitarian structure with a "closed system of logic."

An analysis of this model will demonstrate that it could fit all religious organizations that proselytize, including those that are considered mainline religious organizations. One of two things must follow from this realization: either all religious groups will be potentially liable for successful proselytization; or courts, themselves, with or without the help of an expert witness, must make subjective determinations as to the validity of a religion in order to distinguish those that are engaged in "thought reform" and those that are not.

### A. Element One: Control of Physical and Social Environment

The flexibility with which Dr. Singer applies the first element of her model in this case immediately demonstrates the subjectiveness of her conclusions. Contrary to the facts in this case, in *Molko* v. *Holy Spirit Association*, 46 Cal. 3d 1092, 252 Cal. Reptr. 122, 762 P.2d 46 (1988), another case in which Dr. Singer testified—in that case against the Unification Church—the plaintiffs there were

isolated on a farm owned by the Unification Church. The record, however, in this case as distinguished from *Molko*, shows that the plaintiff, during his involvement with the church, including his very early period, frequently lived independently of the church organization. At times he moved home to Wisconsin, went for long periods without participating in any auditing, and started up several independent businesses or worked for others. Faced with this situation, Dr. Singer found evidence of control of the plaintiff's physical and social environment in the fact that the plaintiff picked up the jargon of Scientology.

In *George* v. *ISKCON*, 213 Cal. App. 3d 729 (1989), *petition for cert. filed*, 58 U.S.L.W. 3598 (U.S. March 20, 1990) (No. 89-1399), Dr. Singer found that the religious group—in that case the Hare Krishnas—had gained control of the plaintiff's physical and social environment by virtue of the fact that the plaintiff had adopted the religious practice of chanting. This was so, she found, despite the fact that much of the chanting occurred in the plaintiff's bedroom in her parents' home and the fact that the plaintiff was regularly attending school.[2]

The ease with which Dr. Singer finds the first element of her model satisfied in these cases reveals the ease with which she, or another expert, could find it satisfied by any religious organization. Many churches conduct retreats for prospective converts. The very purpose of these

---

[2] Amici believe that Dr. Singer's testimony in other cases is extremely relevant to an analysis of this case. If in fact Dr. Singer's analysis under her model of the structure and practices of various religious groups is nothing more than subjective evaluations of the validity of the religious beliefs of those groups, her testimony violates the First Amendment regardless of the terms in which it is presented to the jury. Not only may a court not impose liability on a religious organization based on a determination of a religion's validity by a judge or jury, it may not do so based on such a determination by a so-called expert witness.

retreats is to isolate the initiate from the normal social distractions of the world. In many religions, monastic orders occupy a privileged status. In Buddhism, for example, the monk is seen as preserving the essence of the religion because for a layman to achieve salvation within the dominant culture is virtually impossible. Clearly, physical and social isolation is a common practice in proselytization.

### B. Element Two: Creation of Sense of Powerlessness

Dr. Singer testified that the plaintiff was made to feel powerless because he was led to believe that he wasn't able to handle the defects in his personality without the Church. This is no different from the teachings of almost any religion. Most churches preach that they hold the key to salvation, peace, and happiness. The Church of Christ, Scientist, or Christian Science Church preaches that its doctrine holds the key to physical health.

To say that creation of a sense of powerlessness is an element of a thought reform program implicates almost all religions. The very concept of God in Judeo-Christian tradition envisions an omnipotent God. A Christian finds salvation by surrendering his will to God's will.

### C. Elements Three and Four: Manipulation of Rewards and Punishment to Inhibit Old Social Behavior and to Elicit New Social Behavior

The third and fourth elements of Dr. Singer's theory require the manipulation of rewards, punishments, and experiences to suppress old social behavior and elicit new social behavior. For instance, she says that the Church of Scientology rewards people by giving them better positions in the organization.

The avowed purpose of almost any evangelist would be to elicit new social behavior based on a new set of beliefs and to suppress old social behavior. All creeds have laws

relating to social behavior (*e.g.*, The Ten Commandments). The acceptance or rejection by members of the religious community depending on one's adherence to or departure from accepted behavior is commonplace. Congregations are likely to elect as elders those whose lifestyle best exemplifies the doctrines of their faith. Conversely, most denominations have internal discipline policies for punishing behavior that is contrary to their beliefs (*e.g.*, penance, public discipline, excommunication, shunning). The rewards promised and punishments threatened by mainstream denominations are not just of this world; they include life everlasting or eternal damnation. Once again, Dr. Singer has described something common to almost all religions.

### D. Element Five: The Recruit Is Kept In An Uninformed State

The fifth element of Dr. Singer's model is that the individual is kept uninformed that he is going through a process that is intended to change his beliefs and behavior. Amici have difficulty understanding just what Dr. Singer meant by this element despite having studied her testimony on this point in several cases. A change of religion invariably entails a change of beliefs. Scientology quite plainly involves beliefs radically different from traditional Judeo-Christian beliefs, so conversion to Scientology would unavoidably entail changes of belief for most converts.

It appears that what Dr. Singer meant by this aspect of her theory was that the person is unaware that he/she is being subjected to a "thought reform" program, as she understands such a program. This merely assumes the presence of the very structure that Dr. Singer is trying to prove exists. This element will always be present unless an organization advertises that it engages in brainwashing. To find this element, one must assume that the doc-

trines preached by the organization have no persuasive force of their own.

### E. Element Six: The Process Takes Place In a Totalitarian Structure.

Finally, Dr. Singer explained that the process must take place in a totalitarian structure, or what she calls a "closed system of logic." She explained the closed system of logic by saying that doubts and criticisms are answered by the accusation that the individual still has defects in his personality to be entertaining such negative thoughts.

As with the other elements of her model, this feature merely describes a characteristic common to almost all religions. To say that a system of logic is closed is tantamount to saying that it is whole or complete. Religions by their very nature purport to account, by their doctrines, for all of reality and in this sense are closed or whole systems of logic.

A frequent criticism of Christian theology is that it demands belief in phenomena that it cannot explain. An obvious example is the mystery of the Trinity. Unable to provide a rational explanation of the concept of the Trinity, it is simply declared a mystery incapable of human understanding. "Faith is the substance of things hoped for, the evidence of things not seen." Hebrews 11:1. "Belief in what one may demonstrate to the senses is not faith." *Ballard*, 322 U.S. at 94 (Jackson, J., dissenting).

This examination of Dr. Singer's theory reveals that it can only be applied in a particular situation by making subjective determinations about the religion involved. Its very purpose is to question the validity of religious conversions by questioning the validity of the religion itself.

Amici contend that civil courts may not use an expert witness as a vehicle for making judgments that the Constitution forbids it to make directly. The judgment in this

case gave the force of law to Dr. Singer's conclusion regarding the Church of Scientology and its beliefs and practices. In so doing, the First Amendment was violated.

The plaintiff also hired and paid $25,000 to Dr. Richard Ofshe, a sociologist, to study the Church of Scientology. Dr. Ofshe testified that by studying the organizational structure of the Church of Scientology he was able to determine that the Church was organized in such a way as to intentionally cause the plaintiff emotional distress. Just this bare description of Dr. Ofshe's testimony should shock anyone concerned about religious freedom. A closer look at the testimony will do nothing to relieve the initial shock.

Dr. Ofshe listed five components of the Church organization that indicated to him that it was organized to intentionally inflict emotional distress on the plaintiff. The first of these was the manner in which Scientology was presented to the plaintiff as having a basis in science. With respect to this component, Dr. Ofshe stated: "The significance of that is that it tended to convince Mr. Wollersheim that Scientology was an organization that could produce —that is deliver on what it was represented to him could be produced through involvement with the organization."

The second component was "the element used to convince Mr. Wollersheim that Scientology technology worked." Dr. Ofshe explained that by this he meant the plaintiff heard testimonials to the benefit of Scientology.

The third component was that the SEA Organization was presented to the plaintiff as an elite group and that the plaintiff "was impugned [sic] with the sense that the SEA Organization had a mission. It is essentially a mission to save the world. . . ." This sense of mission allowed the church to demand high levels of commitment and performance from the plaintiff.

The fourth component was the policies and practices used to establish Mr. Wollersheim's role as a Scientologist involving his behavior, attitudes, and feelings. Dr. Ofshe explained that by this he meant that there were rules against "acts of disloyalty or acts of criticism."

The fifth component was the policies designed to keep the plaintiff from leaving the Church. Among these policies Dr. Ofshe pointed to the fact that the Church had instilled in the plaintiff the belief that Scientology could solve his emotional problems, but that they would not be cured by psychology and psychiatry.

It is clear from this summary that Dr. Ofshe's entire testimony was based on the assumptions that Scientology is not valid, that those giving testimonials were lying, that the purported mission to save the world was a fraud, and that Scientology could not solve the plaintiff's problems, but that psychiatry could. Only by making these assumptions could one reach the conclusion arrived at by Dr. Ofshe. Even if one does make these assumptions, it is clear that this testimony was a blatant attack on the validity of the beliefs of Scientology and should not have been allowed in an American court. It is perhaps more offensive than Dr. Singer's testimony. It certainly suffers all the same shortcomings.

Amici have reviewed the testimony of the two experts used by the plaintiff because there is a growing trend of using experts such as and including Dr. Singer in, what *Amici* believe to be the modern form of, heresy trials before potentially hostile juries who do not easily understand or appreciate the existence of new religions and their teachings.

## II. THE IMPOSITION OF PUNITIVE DAMAGES AGAINST RELIGIOUS INSTITUTIONS FOR A TORT CLAIM ARISING OUT OF RELIGIOUS PRACTICES VIOLATES THE FIRST AMENDMENT.

Closely connected and perhaps representative of what may occur in heresy trials is the utilization of punitive

damages to destroy new religious movements. Amici curiae believe that allowing the jury to award punitive damages in this case and in similar cases violates the First Amendment. The power of juries in California to assess punitive damages is almost unrestricted.

> Jury punitive damage awards of an unpredictable nature and appalling inconsistency continue to proliferate. Neither the Legislature nor the appellate courts have been able to formulate coherent reasonable guidelines and limitations for the remedy. Perhaps the quest is utopian and unrealizable.
>
> In practice, it lacks any semblance of consistency between defendants, or even the same defendant in cases tried by different juries.
>
> Because the Legislature has not prescribed guidelines for punitive damages, they must be awarded at whim.

*Woolstrum* v. *Maillous*, 190 Cal. Rptr. 729, 737 (Cal. App. 1983). The standardless discretion given to juries was made clear by the jury instruction in this case which said "[n]ow, the law provides no fixed standard as to the amount of such punitive damages. But leaves the amount to the jury's sound discretion [sic]."

This Court acknowledged the danger to First Amendment freedoms that can be caused by civil damage awards in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). In *New York Times* this Court held that the First Amendment guarantee of freedom of the press prohibited the regular application of the historic common law of libel when a media defendant was reporting on the actions of public officials. This Court announced a much higher standard that plaintiffs must meet in such cases in order to prevail. The standard included an entirely new element of "actual malice" that must be proved before recovery can be had. This standard must be met in order for the plaintiff to recover *compensatory* damages.

This Court specifically addressed the issue of punitive damages in the case of *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). In that case the Court refused to extend the protection of the *New York Times* rule to cases involving private plaintiffs seeking compensatory damages. However, this Court ruled that the First Amendment does require that media defendants receive the protection of the *New York Times* rule even in cases brought by private plaintiffs when they are seeking punitive damages. This Court recognized the danger that punitive damages posed as a result of their very nature.

> In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views.

*Id.* at 350. It would appear from this case that even the gentle rule referred to by this Court has fallen by the wayside in California. While the danger posed by such damages is great, the State's interest in assessing them is slight. They represent a "windfall" to plaintiffs "to which they concededly have no right." *Rosener* v. *Sears Roebuck & Co.*, 168 Cal. Rptr. 237, 248 (Cal App. 1980) (Elkington, J., concurring).

The imposition of punitive damage awards against religious bodies undeniably burdens the free exercise rights of those bodies. They should be allowed only if justified by a compelling state interest not otherwise served. *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972).

In *Gertz* this Court recognized "the strength of the legitimate state interest in compensating private individuals for wrongful injury," 418 U.S. at 348, but added that

"this countervailing state interest extends no further than compensation for actual injury," *id.* at 349. In reaching its conclusion, this Court noted: "In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." *Id.* at 342.

Therefore, this Court held:

> The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinions rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.
>
> We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehoods reach no farther than is necessary to protect the legitimate interest involved. . . .
>
> Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injuries. Instead, they are private fines levied by civil juries. . . .

*Id.* at 349-50.

The free exercise of religion is no less in need of "breathing space" than freedom of the press. Religious institutions are just as inhibited in the pursuit of constitutionally protected activities as are media institutions by the threat of unrestricted punitive damage awards, and unorthodox bodies even more so. In fact, the burden placed on religious institutions, because of their nature, is even greater than that placed on media outlets. In *New York Times* the defendant that the Court felt was in need of special protection was a large for-profit corporation. Religious institutions are not-for-profit organizations largely, if not entirely, dependent upon voluntary contributions from the faithful. Not only are such organizations likely to have fewer assets, but the source of their income can be affected by a punitive damage award. It is not an unlikely prospect that donations will dry up if it is perceived that the money will go not to further the religious mission of the organization, but to satisfy a windfall judgment of a successful plaintiff.

This Court has recognized that certain types of entities need special protection from punitive damages because of the resulting harm to parties other than the wrongdoers that would be caused by such awards. In barring the award of punitive damages against municipalities in section 1983 actions, this Court reasoned:

> [P]unitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.
>
> Under ordinary principles of retribution, it is the wrongdoer himself who is made to suffer for his unlawful conduct. If a government official acts knowingly and maliciously to deprive others of their civil rights, he may become the appropriate object of the

> community's vindictive sentiments. A municipality, however, can have no malice independent of the malice of its officials. Damages awarded for *punitive* purposes, therefore, are not sensibly assessed against the governmental entity itself.

*Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981) (citations omitted) (emphasis in original).

Similarly, this Court prohibited the assessment of punitive damages against the union in *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 50-51 (1979) (citations and footnote omitted), for the following reasons:

> Because juries are accorded broad discretion both as to the imposition and amount of punitive damages, the impact of these windfall recoveries is unpredictable and potentially substantial. Such awards could deplete union treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents. Inflicting this risk on employees, whose welfare depends upon the strength of their union, is simply too great a price for whatever deterrent effect punitive damages may have.

Just as the economic welfare of workers can be dependent upon the financial health of their union, the spiritual welfare of believers can be dependent upon the continued existence and functioning of their church as an institution. Church members should not bear this risk in order to supply a windfall recovery to a fully compensated tort plaintiff.

It is perhaps instructive to note that in *Newport* the plaintiff was asserting fundamental constitutional rights while the defendants asserted no constitutional defense. Under these circumstances, this Court still held that punitive damages caused too much harm to justify whatever value they had as a means of vindicating constitutional rights. In this case, it is the defendant and not the

plaintiff that is asserting a fundamental constitutional right. The institution that will be harmed by an award of punitive damages is one given special protection by the First Amendment. The rights of the plaintiff being vindicated are not constitutional in nature. In these circumstances it seems clear that the burden on First Amendment rights caused by the imposition of punitive damages against a religious institution is not justified by a compelling state interest.

There is a rise in litigation being directed against religious organizations. In case after case plaintiffs are seeking not only compensatory but also punitive damages. Since First Amendment rights are implicated, the time is ripe for this Court to determine whether punitive damages in circumstances such as presented in this case may be awarded to a tort plaintiff.

## CONCLUSION

For the above reasons, amici urge that the petition for a writ of certiorari be granted in this case.

Dated: March 28, 1990

Respectfully submitted,

LEE BOOTHBY
*(Counsel of Record)*
BOOTHBY, ZIPRICK & YINGST
9047 US 31 North, Suite 201
Berrien Springs, MI 49103
(616) 471-7787

ROBERT W. NIXON
12501 Old Columbia Pike
Silver Spring, MD 20904-1608
(301) 680-6320

*Attorneys for* Amici Curiae

No. 89-1361

Supreme Court, U.S.
FILED
APR 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

*Petitioner,*

—v.—

LARRY WOLLERSHEIM,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

## SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ERIC M. LIEBERMAN
Counsel of Record
DAVID B. GOLDSTEIN
RABINOWITZ, BOUDIN, STANDARD, KRINSKY & LIEBERMAN, P.C.
740 Broadway-Fifth Floor
New York, New York 10003-9518
(212) 254-1111

MICHAEL LEE HERTZBERG
740 Broadway-Fifth Floor
New York, New York 10003
(212) 982-9870

*Attorneys for Petitioner Church of Scientology of California*

BEST AVAILABLE COPY

## TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ..... ii

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.. 1

## TABLE OF AUTHORITIES

**Cases:** PAGE

*California* v. *American Stores Co.*, 110 S.Ct. 1, 2 (1989) (O'Connor, J., in chambers) ..... 2

*International Society for Krishna Consciousness of California* v. *George*, No. 89-1399 .....1, 2, 3

*Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)..... 2

*United States* v. *Krishman*, No. CR-88-0616-DLJ (N.D. Calif.)..... 2, 3

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

**No. 89-1361**

---

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
*Petitioner*,

—v.—

LARRY WOLLERSHEIM,
*Respondent*.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

---

## SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

---

Petitioner Church of Scientology of California submits this Supplemental Memorandum to bring to the Court's attention two new additional factors relevant to the Court's consideration of the petition pending in this case.

1. On April 16, 1990, this Court issued an order continuing the order previously issued by Justice O'Connor staying execution of the judgment in a case entitled *International Society for Krishna Consciousness of California* v. *George*, No. 89-1399, pending this Court's disposition of the petition for a writ of certiorari in the *George* case. The petition in this case raises questions similar to, but broader than, the questions presented in *George*. In particular, the first question presented in this case encompasses but is broader than the first question presented in *George*. The second question

presented in this petition is virtually identical to the second question presented in *George*, and the third question presented in this case is substantially related to the second question presented in both petitions. The fourth and fifth questions presented in this case are similar to and are encompassed within the third question presented in the *George* petition.

In granting a stay of execution of judgment in the *George* case, this Court apparently has made a preliminary determination that there is a reasonable probability that the petition in *George* may be granted and a fair prospect that the questions presented will result in reversal of the judgment below. *California* v. *American Stores Co.*, 110 S.Ct. 1, 2 (1989) (O'Connor, J., in chambers); *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). The respondent's brief in opposition to the petition in the *George* case is scheduled to be filed today, April 17, 1990. The petition in *George* has not been set for conference. We have been informed by the clerk's office that the petition in this case has been scheduled for conference on April 20, 1990. We submit this Supplemental Memorandum to highlight to the Court the similarity and overlap between the petitions in the two cases. Petitioner submits that the petitions in both the *George* case and this case should be granted.

2. In our Reply Brief in Support of Petition for Writ of Certiorari (at p. 3, n.3), we noted that a federal district court in California had issued an order precluding the testimony of psychologist Margaret Singer and sociologist Richard Ofshe on the subject of "coercive persuasion" and "thought reform" on the ground that their theories are not widely recognized in the scientific community. *United States* v. *Fishman*, No. CR-88-0616-DLJ (N.D. Calif.).

On April 13, the district court in that case issued a twenty-four page opinion explaining the reasons for its order. The opinion further highlights the faulty basis upon which were based the assaults on religious free exercise in this case and

the George case.[1] The district court in *Fishman* found, based upon an "expansive record" (slip op. at 12), that "the scientific community has resisted the Singer-Ofshe thesis applying coercive persuasion to religious cults" (*id.* at 11), and that "there is no consensus or general acceptance within [the American Psychological Association and the American Sociological Association] regarding the thought reform theories of Dr. Singer and Dr. Ofshe" (*id.* at 12). The court stated:

> Dr. Singer and Dr. Ofshe contend that an individual's free will can be overborne by persuasive techniques in the absence of physical force. They further contend that they can pinpoint with scientific accuracy the degree of non-physical coercion necessary to overcome the free will of an individual having a particular personality composite.
>
> * * *
>
> There is no consensus within the scientific community regarding whether the deprivation of free will occurs in these circumstances, nor is there a consensus on how to measure this deprivation.

Slip op. at 13-14.

The *Fishman* court's holding that the theories of Singer and Ofshe "are not sufficiently established to be admitted as evidence in federal courts of law" (*id.* at 14), stands in stark contrast to the approach taken by the California trial and appellate courts in cases such as this case and *George*, where such theories were admitted as a basis for finding peaceful religious practices to be actionable as "outrageous conduct." Certiorari should be granted, *inter alia*, to resolve the growing conflict among the lower courts as to whether controversial and unscientific theories of peaceful "coercive persuasion" may be imposed as a basis for imposing sub-

---

1 Both here and in *George* the plaintiffs relied heavily on the expert testimony of Singer and Ofshe on "coercive persuasion" and "thought reform".

stantial burdens on the free exercise of peaceful religious practices.

Respectfully submitted,

ERIC M. LIEBERMAN
Counsel of Record
DAVID B. GOLDSTEIN
RABINOWITZ, BOUDIN, STANDARD,
KRINSKY & LIEBERMAN, P.C.
740 Broadway-Fifth Floor
New York, New York 10003-9518
(212) 254-1111

MICHAEL LEE HERTZBERG
740 Broadway-Fifth Floor
New York, New York 10003
(212) 982-9870

*Attorneys for Petitioner*
*Church of Scientology*
*of California*

(6)

No. 89-1361

Supreme Court, U.S.
FILED
MAR 8 1991
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

*Petitioner*,

—v.—

LARRY WOLLERSHEIM,

*Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

## PETITIONER'S SECOND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ERIC M. LIEBERMAN
Counsel of Record
DAVID B. GOLDSTEIN
RABINOWITZ, BOUDIN, STANDARD, KRINSKY & LIEBERMAN, P.C.
740 Broadway - Fifth Floor
New York, New York 10003-9518
(212) 254-1111

MICHAEL LEE HERTZBERG
740 Broadway - Fifth Floor
New York, New York 10003
(212) 982-9870

*Attorneys for Petitioner Church of Scientology of California*

March 8, 1991

## TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ..... ii

1. THE DECISION AND OPINIONS IN *HASLIP* WARRANT THAT CERTIORARI BE GRANTED IN THIS CASE, EITHER FOR THE PURPOSE OF UNDERTAKING PLENARY REVIEW, OR, AT THE LEAST, FOR THE PURPOSE OF REMANDING TO THE COURT OF APPEAL OF CALIFORNIA FOR RECONSIDERATION IN LIGHT OF *HASLIP* ..... 1

2. *HASLIP* DID NOT ADDRESS THE QUESTIONS OF WHETHER THE FIRST AMENDMENT PROSCRIBES PUNITIVE DAMAGE AWARDS FOR SPEECH OR PEACEFUL RELIGIOUS PRACTICES, OR WHETHER IT MANDATES APPLICATION OF MORE PRECISE PROCEDURAL AND SUBSTANTIVE STANDARDS THAN ARE REQUIRED IN AN ORDINARY TORT CASE ..... 6

3. CERTIORARI SHOULD BE GRANTED ON THE FIRST THREE QUESTIONS RAISED BY THE PETITION..... 7

CONCLUSION ..... 9

## TABLE OF AUTHORITIES


| Cases | PAGE |
|---|---|
| *Allard v. Church of Scientology of California*, 58 Cal.App.3d 439, 129 Cal.Rptr. 797 (1976), *cert. denied*, 429 U.S. 1091 (1977) | 5 |
| *Bertero v. National General Corp.*, 13 Cal.3d 43, 118 Cal.Rptr. 184, 529 P.2d 608 (1974) | 4 |
| *Brewer v. Second Baptist Church*, 32 Cal.2d 791, 197 P.2d 713 (1948) | 4, 6 |
| *Collins v. Lucky Markets, Inc.*, 274 Cal.App.2d 645, 79 Cal.Rptr. 454 (1969) | 5 |
| *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) | 4 |
| *Cunningham v. Simpson*, 1 Cal.3d 301, 81 Cal.Rptr. 855, 461 P.2d 39 (1969) | 5 |
| *Downey Savings & Loan Ass'n v. Ohio Casualty Ins. Co.*, 189 Cal.App.3d 1072, 234 Cal.Rptr. 835 (1987), *cert. denied*, 486 U.S. 1036 (1988) | 4 |
| *Gerard v. Ross*, 204 Cal.App.3d 968, 251 Cal.Rptr. 604 (1988) | 3 |
| *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) | 7 |
| *Goshgarian v. George*, 161 Cal.App.3d 1214, 208 Cal.Rptr. 321 (1984) | 5 |
| *Haines v. Parra*, 193 Cal.App.3d 1553, 239 Cal.Rptr. 178 (1987) | 4 |
| *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986) | 2 |
| *Hernandez v. C.I.R.*, 109 S.Ct. 2136 (1989) | 8 |
| *Higgins v. Maher*, 210 Cal.App.3d 1168, 258 Cal.Rptr. 757 (1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1135 (1990) | 7, 8 |

PAGE

*International Society for Krishna Consciousness v. George*, No. 89-1399 (filed Feb. 28, 1990) ..... 6

*Liodas v. Sahadi*, 19 Cal.3d 278, 137 Cal.Rptr. 635, 562 P.2d 316 (1977) ..... 5

*Little v. Stuyvesant Life Ins. Co.*, 67 Cal.App.3d 451, 136 Cal.Rptr. 653 (1977) ..... 5

*Minneapolis, St. Paul and S.S.M. Ry. Co. v. Moquin*, 283 U.S. 520 (1931) ..... 4

*Pacific Mutual Life Insurance Co. v. Haslip*, No. 89-1279, ____ U.S. ____ (March 4, 1991) .....*passim*

*Rosener v. Sears, Roebuck & Co.*, 110 Cal.App.3d 740, 168 Cal.Rptr. 237 (1980), *app. dism'd*, 450 U.S. 1051 (1981) ..... 5

*Windeler v. Scheers Jewelers*, 8 Cal.App.3d 844, 88 Cal.Rptr. 39 (1970) ..... 3

*Zhadan v. Downtown Los Angeles Motors*, 66 Cal.App.3d 481, 136 Cal.Rptr. 132 (1976) ..... 5

**Constitutional and Statutory Provisions**

U.S. Const. Amend. I ..... 6, 7

U.S. Const. Amend. XIV .....2, 4, 5

Cal. Civ. Code § 3294(b) ..... 3

Cal. Code Civ. Pro. § 657 ..... 3

**Treatises**

6 B. Witkin, Summary of California Law (9th ed. 1988) ..... 4

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

**No. 89-1361**

---

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

*Petitioner,*

—v.—

LARRY WOLLERSHEIM,

*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

---

## PETITIONER'S SECOND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

---

Petitioner Church of Scientology of California submits this second Supplemental Memorandum in response to this Court's recent decision in *Pacific Mutual Life Insurance Co. v. Haslip*, No. 89-1279, ____ U.S. ____ (March 4, 1991).

**1. The Decision and Opinions in *Haslip* Warrant That Certiorari Be Granted in This Case, Either for the Purpose of Undertaking Plenary Review, or, at the Least, for the Purpose of Remanding to the Court of Appeal of California for Reconsideration in Light of *Haslip***

The Court's opinion in *Haslip* recognized the importance of reviewing the particular method of taxing and reviewing punitive damages in a given case or jurisdiction. The Court

focused on the jury instructions, the presence or absence of meaningful review by the trial court to protect against unreasonable punitive damage awards, and the presence or absence of meaningful appellate review of the verdict. In addition, Justice Kennedy's concurrence emphasized:

> A verdict returned by a biased or prejudiced jury no doubt violates due process, and the extreme amount of an award compared to the actual damage inflicted can be some evidence of bias or prejudice in an appropriate case.

Slip op. at 3 (Kennedy, J., concurring).

In this case, there was no meaningful review by the trial court, the appellate review was undertaken pursuant to a standard disapproved by this Court in *Haslip*, and the appellate court upheld a modified punitive damage (and compensatory damage) verdict despite its explicit recognition that the amount of the jury's award ($30,000,000, of which $25,000,000 were punitive damages) actually demonstrated passion or prejudice. Indeed, the court explicitly found the award "not just excessive but preposterous." Pet. at 43a.

A. In *Haslip*, the Court emphasized that the Supreme Court of Alabama had established meaningful "post-trial procedures for scrutinizing punitive awards", slip op. at 17, pursuant to which trial courts are required " 'to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of damages.' " *Id.* (quoting *Hammond v. City of Gadsden*, 493 So.2d 1374, 1379 (Ala. 1986)). Indeed, Alabama trial courts are enjoined to consider such factors as culpability, deterrence, and impact upon the parties and upon third parties. *Id.*

In the present case, the trial court refused to exercise any such responsibilities, and under California law, unlike Alabama law, was under no obligation to do so. The Church's motions for new trial and judgment notwithstanding the verdict, urging, *inter alia*, that the $30,000,000 damage award

was grossly excessive, were rejected with the simple notation "denied" on a minute order of the court. Pet. at 45a.[1]

B. In *Haslip*, this Court relied in major part upon "the detailed substantive standards [the Alabama Supreme Court] has developed for evaluating punitive awards" at the appellate stage. Slip op. at 17. In doing so, this Court contrasted the Alabama standards for appellate review, which permit the vacating or reduction of a punitive damage award on grounds of mere excessiveness, with the standards applied by the appellate courts in Vermont and Mississippi, which permit an appellate court to set aside an award only when it evinces passion, bias or prejudice (Mississippi) or is manifestly and grossly excessive (Vermont). *Id.* at 17-18 n.10.

In California, as the Court of Appeal recognized, the appellate courts are limited in the same way as the courts of Mississippi; they may set aside or modify a punitive damage award only if they determine "whether, after reviewing the entire record in the light most favorable to the judgment, the award was the result of passion or prejudice." Pet. at 41a-42a.

---

1 In California, unlike Alabama, trial courts need not give any reasons for a decision to *deny* a post-trial motion based on an excessive award of damages; only if the court *grants* the motion need it explain its reasoning. Cal. Code Civ. Pro. § 657 (West's 1976); *Gerard v. Ross*, 204 Cal.App.3d 968, 978-79, 251 Cal.Rptr. 604, 610 (1988). A trial court's unexplained denial of a post-trial motion asserting that damages are excessive is reviewed under the deferential abuse of discretion standard. *Windeler v. Scheers Jewelers*, 8 Cal.App.3d 844, 854, 88 Cal.Rptr. 39, 45-46 (1970).

The trial court's broad discretion is not limited solely to the *amount* of punitive damages, but also to the *method* by which punitive damages are imposed. Thus, at least according to the results in the instant case, the trial courts in California have the discretion to instruct or to refuse to instruct juries that, pursuant to statute—Cal. Civ. Code § 3294(b)—punitive damages may not be awarded on a *respondeat superior* theory. The trial court's refusal to give such an instruction in this case, in apparent open disregard of the statute, was not even addressed by the Court of Appeal. Pet. at 28 n.23. Application of the statutory standard would thus appear to be discretionary.

To be sure, as the Court of Appeal noted, the passion and prejudice standard has been "somewhat more refined, employing three factors to evaluate the propriety of the award." *Id.* at 42a.[2] The three factors, however, serve only to help define the essential passion and prejudice standard. In sharp contrast to the Alabama practice, but just as in Mississippi, without a finding of "passion and prejudice", the California appellate courts are without power to disturb a punitive damage award. *Bertero v. National General Corp.*, 13 Cal.3d 43, 64-65 & n.12, 118 Cal.Rptr. 184, 199-200 & n.12, 529 P.2d 608 (1974); *Downey Savings & Loan Ass'n v. Ohio Casualty Ins. Co.*, 189 Cal.App.3d 1072, 1099, 234 Cal.Rptr. 835, 850 (1987), *cert. denied*, 486 U.S. 1036 (1988); Pet. at 41a-42a.

C. By finding that the verdict in this case was the result of passion or prejudice on the part of the jury, but nevertheless *modifying* rather than vacating the punitive damage award, the Court of Appeal below reached an anomalous and unconstitutional result. As Justice Kennedy emphasized in his concurring opinion in *Haslip*, "A verdict returned by a biased or prejudiced jury no doubt violates due process. . . ." Slip op. at 3; *see Minneapolis, St. Paul and S.S.M. Ry. Co. v. Moquin*, 283 U.S. 520, 521 (1931); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 160 (1967). The passion or prejudice of the jury thus infects not only the amount of the punitive damage award, but also the determination whether to impose punitive damages *at all*, which, in California at least, is a matter wholly within the discretion of the jury. *Brewer v. Second Baptist Church*, 32 Cal.2d 791, 800-01, 197 P.2d 713 (1948); *Haines v. Parra*, 193 Cal.App.3d 1553, 239 Cal.Rptr. 178 (1987); 6 B. Witkin, *Summary of California Law* § 1373, at 840 (9th ed. 1988). California's system, applied in this case, of affirming but modifying punitive damage awards upon an explicit finding that the jury's discretionary award

---

2 The three factors—degree of reprehensibility of the defendant's conduct, relationship between the amount of the award and the actual harm suffered, and relationship to defendant's net worth—are similar to some of the categories applied by the Alabama Supreme Court, but are far less comprehensive. *Haslip*, slip. op. at 18.

of punitive damages was infected by passion and prejudice, violates due process.

Indeed, the California system of appellate review is doubly defective under the due process clause because, in cases in which it is found that the punitive damage award is so excessive as to evince passion and prejudice on the part of the jury, California appellate courts are permitted to choose *either* to modify the punitive damage award, to vacate the punitive award, or to vacate the judgment entirely, without meaningful standards or principles to guide that choice. *Cunningham v. Simpson*, 1 Cal.3d 301, 310, 81 Cal.Rptr. 855, 861, 461 P.2d 39, 45 (1969); *Zhadan v. Downtown Los Angeles Motors*, 66 Cal.App.3d 481, 502, 136 Cal.Rptr. 132, 144 (1976). While one California court has stated that where "the jury arrived at an excessive verdict from passion and prejudice, we doubt the propriety of conditioning the order for new trial on the acceptance of remittitur", *Collins v. Lucky Markets, Inc.*, 274 Cal.App.2d 645, 79 Cal.Rptr. 454, 460 n.3 (1969), and while the California Supreme Court at least once stated that "any doubts should be resolved in favor of granting a new trial", *Liodas v. Sahadi*, 19 Cal.3d 278, 285-86, 137 Cal.Rptr. 635, 639, 562 P.2d 316 (1977), the cases are legion in which the California appellate courts have, as here, found passion and prejudice but have merely reduced the punitive damage award, without any attempt to explain why outright vacatur is not appropriate or required by due process. *See Little v. Stuyvesant Life Ins. Co.*, 67 Cal.App.3d 451, 470, 136 Cal.Rptr. 653, 664 (1977) (jury award infected by passion and prejudice; "justice will be best served" by reducing punitive damage award, rather than vacating it, without further explanation); *Allard v. Church of Scientology of California*, 58 Cal.App.3d 439, 452-53, 129 Cal.Rptr. 797, 805-06 (1976) (same), *cert. denied*, 429 U.S. 1091 (1977); *Rosener v. Sears, Roebuck & Co.*, 110 Cal.App.3d 740, 753, 168 Cal.Rptr. 237, 244 (1980) (same; "modify . . . to do justice"), *app. dism'd*, 450 U.S. 1051 (1981); *Goshgarian v. George*, 161 Cal.App.3d 1214, 1230, 208 Cal.Rptr. 321, 331-32 (1984) (same).

Once again, the problem is highlighted by the instant case, where the Court of Appeal chose to modify rather than vacate both the compensatory and punitive damage awards, without a word of explanation as to why it chose that course or pursuant to what standards.[3]

**2. *Haslip* Did Not Address The Questions of Whether the First Amendment Proscribes Punitive Damage Awards for Speech or Peaceful Religious Practices, or Whether it Mandates Application of More Precise Procedural and Substantive Standards Than Are Required in An Ordinary Tort Case**

In its petition in this case, the Church argued that the First Amendment imposed substantive and procedural limitations upon the award of punitive damages. *See* Pet. at 26-29.[4] These issues were raised in the *Haslip* case in several *amicus* briefs, including a short *amicus* brief submitted by the petitioner herein.[5]

The Court's opinion in *Haslip* did not discuss the questions raised under the First Amendment. Justice Scalia's concurrence, however, did recognize "the proposition that punitive damages, despite their historical sanction, can violate the

---

3 The Court of Appeal made *no* finding, nor could it reasonably have done so, that the evidence at trial *compelled* a finding of liability, let alone of punitive damages. Rather, in reviewing the evidence, the Court of Appeal stated that it was doing so in the light *most favorable* to the plaintiff, Pet. at 6a, and held only that there was "substantial evidence" to support the verdict, *id.* at 10a-11a, not that the evidence mandated a verdict for the plaintiff. With respect to punitive damages, as we have shown, an appellate court can never presume that such an award is compelled, because it is always discretionary with the jury. *Brewer v. Second Baptist Church*, 32 Cal.2d at 800-01.

4 Similar questions are raised by the pending petition in *International Society for Krishna Consciousness v. George*, No. 89-1399 (filed Feb. 28, 1990).

5 *See* Brief *Amicus Curiae* of The National Council of Churches of Christ in the U.S.A., *et al.*; Brief *Amicus Curiae* of CBS Inc., *et al.*; Brief *Amicus Curiae* of Church of Scientology of California.

First Amendment." Slip op. at 15 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-350 (1974)).

The questions raised concerning First Amendment limitations on the imposition of punitive damages arise frequently, both in cases involving religious free exercise and in cases involving speech. For the reasons stated in the petition herein and in the *amicus* briefs filed in *Haslip*, the petition should be granted to resolve those questions.

### 3. Certiorari Should Be Granted on the First Three Questions Raised By The Petition

The *Haslip* case, of course, did not involve the first three questions raised by the petition in this case, concerning First Amendment proscriptions upon the trial, judgment and affirmance of the underlying verdict in this case, which rested upon the plaintiff's voluntary participation in peaceful religious practices. Those questions remain particularly deserving of this Court's attention now, for the reasons stated in the petition.

We merely note that the state of uncertainty and chaos in the courts on these questions not only remains unabated, but grows apace. In *Higgins v. Maher*, 210 Cal.App.3d 1168, 258 Cal.Rptr. 757 (1989), *cert. denied*, ____ U.S. ____, 110 S.Ct. 1135 (1990), another district of the Court of Appeal of California dismissed the complaint of a Roman Catholic priest against his Bishop and the Church for his removal from his position, subsequent psychiatric treatment, which included drugs and electroshock therapy,[6] and public revelation of alleged private defamatory information. The court found that the complaint adequately alleged "torts of invasion of privacy, defamation, and the intentional and negligent infliction of emotional distress." *Id.* at 1175, 258 Cal.Rptr. at 761. The

---

6 Higgins averred that "upon persuasion from the Church," he "underwent a program of rehabilitation with a therapy-oriented organization within the church," during which he was "given various drugs which caused him to become nervous and lose much of his reasoning ability" and that he was "treated with electroshock therapy." 210 Cal.App.3d at 1172, 258 Cal. Rptr. at 758.

court, however, dismissed the complaint because, even if defendants had engaged in the alleged tortious conduct, "the acts so taken were part and parcel of the Bishop's administration of his ecclesiastical functions." *Id.* at 1175-76, 258 Cal.Rptr. at 761. As the court stated:

> the torts recited are simply too close to the peculiarly religious aspects of the transaction to be segregated and treated separately—as simple civil wrongs. The making of accusations of misconduct; the discussion of same within the order; the recommendation of psychological or medical treatment; the infliction, whether intentionally or negligently, of emotional distress—these are all activities and results which will often, if not usually, attend the difficult process by which priestly faculties are terminated.

*Id.* at 1176, 258 Cal.Rptr. at 761.

The practices in *Higgins* are in stark contrast to the peaceful religious practice of auditing[7] at issue in this case, where the plaintiff suffered no physical harm. Instead, the plaintiff decided, after ten years of adherence to the Scientology faith, that his participation in auditing caused him emotional harm, for which the jury awarded him the "preposterous" (Pet. at 43a) sum of $30,000,000. *Higgins* is in fundamental conflict with the decision of the Court of Appeal in this case, and represents yet another example of the varied and unreconcilable decisions in the area. Certiorari should be granted to resolve such questions.

---

7 Auditing consists of a parishioner and auditor sitting in a room while the auditor asks a series of questions to which the parishioner responds. *See* Pet. at 3; *Hernandez v. C.I.R.*, 109 S.Ct. 2136, 2141 & n.2 (1989).

## CONCLUSION

For the reasons stated herein, and in petitioner's previously filed petition and briefs, the petition for a writ of certiorari should be granted.

Dated: March 8, 1991

Respectfully submitted,

ERIC M. LIEBERMAN
Counsel of Record
DAVID B. GOLDSTEIN
RABINOWITZ, BOUDIN, STANDARD,
KRINSKY & LIEBERMAN, P.C.
740 Broadway - Fifth Floor
New York, New York 10003-9518
(212) 254-1111

MICHAEL LEE HERTZBERG
740 Broadway - Fifth Floor
New York, New York 10003
(212) 982-9870

*Attorneys for Petitioner*
*Church of Scientology*
*of California*